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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SANBORN-CUTTING COMPANY, a
corporation,

Appellant,

vs.

V. A. PAINE, as Trustee of the Kake Trading and Packing Company, a corporation,
Bankrupt,

Appellee.

TRANSCRIPT OF RECORD

On Appeal from the District Court of the United
States for the District of Oregon.

Filed

DEC 27 1916

F. D. Monekton,

Clerk.

United States Circuit Court of Appeals

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SANBORN-CUTTING COMPANY, a
corporation,

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V. A. PAINE, as Trustee of the Kake Trading and Packing Company, a corporation,
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*United States Circuit Court of Appeals for the
Ninth Circuit.*

SANBORN-CUTTING COMPANY, a
corporation,

Appellant,

vs.

V. A. PAINE, as Trustee of the Kake Trading and Packing Company, a corporation,
Bankrupt,

Appellee.

NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD:

G. C. and A. C. Fulton, Astoria, Oregon, for the Appellant.

Gunnison & Robertson, Juneau, Alaska, and James J. Crossley, Gerlinger Building, Portland, Oregon, for Appellee.

*In the District Court of the United States for the
District of Oregon.*

V. A. PAINE, as Trustee of the Kake Trading and Packing Company, a corporation,
Bankrupt,
Plaintiff,

vs.

F. P. KENDALL, GEORGE W. SANBORN, S. S. GORDON, KAKE PACKING COMPANY, a corporation, and SANBORN - CUTTING COMPANY, a corporation,
Defendants.

CITATION ON APPEAL.

To V. A. Paine, Trustee of the Kake Trading & Packing Company, a corporation, bankrupt, plaintiff above named,

Greeting:

WHEREAS, the defendant Sanborn-Cutting Co., a corporation, has lately appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from a decree rendered in the District Court of the United States, for the District of Oregon, in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear before said

United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, within thirty (30) days from the date hereof, to do and receive what may appertain to justice to be done in the premises, and to show cause, if any there be, why the said judgment and decree rendered and entered in said District Court aforesaid in said appeal mentioned should not be reversed, modified or corrected, and speedy justice should not be done on that behalf.

Given under my hand and seal, at the City of Portland, in the United States District Court for the District of Oregon, this 25th day of July, A. D. 1916.

R. S. BEAN,

Judge of the United States District Court, for the District of Oregon.

Due service of the foregoing citation on appeal is hereby accepted and acknowledged, together with a true copy thereof, this 25th day of July, A. D. 1916.

JAMES J. CROSSLEY,

Of Attorneys for Plaintiff,

By J. N. Hart.

Filed July 25, 1916.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

NOVEMBER TERM, 1915.

BE IT REMEMBERED, that on the 6th day of December, 1915, there was duly filed in the District

Court of the United States for the District of Oregon,
a Bill of Complaint, in words and figures as follows, to
wit:

BILL OF COMPLAINT.

*In the District Court of the United States for the
District of Oregon.*

V. A. PAINE, as Trustee of the Kake Trading
and Packing Company, a corporation,
Bankrupt,

Plaintiff,

vs.

F. P. KENDALL, GEORGE W. SAN-
BORN, S. S. GORDON, KAKE
PACKING COMPANY, a corporation,
and the SANBORN CUTTING COM-
PANY, a corporation,

Defendants.

IN EQUITY.

To the Honorable, the Judges of the District Court of
the United States in and for the District of Oregon:

Your orator, V. A. Paine, as Trustee of the Estate
of the Kake Trading and Packing Company, Bankrupt,
a corporation, duly organized and existing under the
laws of the State of Washington, and a citizen of said
state, brings this his bill of complaint for and on behalf
of himself as Trustee of said Kake Trading and Packing
Company, a corporation, bankrupt, and for and on be-

half of all of the stockholders of the Kake Packing Company similarly situated, who may wish to join in and pay their proportionate share of the costs hereof, and for and on behalf of and for the benefit of the Kake Packing Company, against F. P. Kendall, S. S. Gordon, and George W. Sanborn, citizens of the State of Oregon and residents therein, and the Sanborn Cutting Company, a corporation duly organized and existing as plaintiff is informed and believes, and therefore charges it to be true, under the laws of the State of Oregon, and a citizen and resident thereof, and the Kake Packing Company, a corporation duly organized and existing under the laws of the State of Oregon and a citizen and resident thereof; and thereupon your orator alleges as follows:

FIRST: That the Kake Trading and Packing Company is a corporation duly organized and existing under the laws of the State of Washington, and a resident of said state, and doing business in the Territory of Alaska, at the village of Kake; that heretofore, on the 9th day of April, 1915, said Kake Trading and Packing Company duly filed its petition to be adjudicated a bankrupt, and thereafter, and on said day, was, in accordance with the provisions of the Acts of Congress relating to Bankruptcy, duly adjudicated a bankrupt in the United States Court for the District of Alaska, Division Number One, at Juneau, by the Honorable Robert W. Jennings, Judge sitting in Bankruptcy, and that thereafter a reference was duly made by said Court to A. H. Ziegler, Esq., Referee in Bankruptcy of said Court, for further proceedings in said matter; and that

thereupon and in due course plaintiff was elected and appointed the Trustee of said Bankrupt, on the 8th day of May, 1915, and that plaintiff did accept such trust and did qualify and file his bond as said Trustee and has been at all times since and is now the duly elected, appointed, qualified and acting Trustee for the Estate of said Kake Trading and Packing Company, a corporation, bankrupt; and that your orator as such Trustee is now the owner of all the property and assets of said bankrupt; and that the assets in hand of said bankrupt are not sufficient to pay the just and lawful claims and demands of its creditors;

SECOND: Your orator further says that the defendant Kake Packing Company is a corporation duly organized and existing under the laws of the State of Oregon, and a citizen and resident of said state, and was doing and carrying on a business in said state and in the Territory of Alaska, at or near the village of Kake, at the time hereinafter set forth; and your orator further says he is informed and believes and therefore charges it to be true that the defendant Sanborn Cutting Company is a corporation organized and existing under the laws of the State of Oregon, and a resident and citizen of said state, and doing business therein and in the Territory of Alaska, at or near the village of Kake; and your orator further says that the defendants F. P. Kendall, S. S. Gordon, and George W. Sanborn, are residents and citizens of the State of Oregon.

THIRD: Your orator further says that one Ernest Kirberger was, at the times hereinafter mentioned, President, Manager, and a Trustee of the Kake Trading and

Packing Company, bankrupt, and owner of the majority of stock thereof; and that said Kirberger as such manager conducted and carried on the business of the Kake Trading and Packing Company at Kake, in the Territory of Alaska, for a long number of years prior to the 9th day of April, 1915, at which time said corporation was adjudicated a bankrupt as aforesaid; that during said time, said corporation was mainly engaged in the trading and mercantile business, but that it had become possessed and was the owner of certain lands, buildings, water rights, and other property valuable for use in the fishing and salmon packing industry, and that during a portion of said time, said corporation had either itself, or by lease to others, used said land, buildings, and other property for the mild curing of fish; that said Kirberger, during said time, did become greatly and unduly enthused over the prospects of the fishing industry in the Territory of Alaska, and that he formed exaggerated illusions in regard to the profits and earnings to be made out of such business; and such illusions were so great as to make him unable to use ordinary and good judgment in matters pertaining thereto;

FOURTH: Your orator further says he is informed and believes and therefore charges it to be true, that said Kirberger thereafter and while in said state of mind, became acquainted with the defendants, F. P. Kendall, S. S. Gordon, and George W. Sanborn, who at said time were either directly or indirectly connected with and engaged in the salmon fishing industry in the State of Oregon; that the said Sanborn, Gordon and Kirberger, thereupon and on or about the 19th day of

February, 1912, organized the Kake Packing Company for the purpose of engaging generally in the business of packing, preserving and pickling and processing in all forms and by such processes as might be determined from time to time salmon and all kinds of fish, including the power to can, preserve and process all kinds of vegetables, foods and all products capable of being manufactured into food, both in the State of Oregon and in the Territory of Alaska, or such other place or places as the Board of Directors of said corporation might determine, and for other purposes, in the State of Oregon and in the Territory of Alaska; and that on said day, the said corporation was incorporated under the laws of the State of Oregon by said Sanborn and Gordon and Kirberger, with a capital stock of Fifty Thousand (\$50,000.00) Dollars; that said capital stock was divided into five hundred (500) shares and that the par value of each share was One Hundred (\$100.00) Dollars; that thereafter, the said defendant Kendall and the said defendant Sanborn agreed to and each did purchase eighty-five (85) shares of stock in said corporation, and said defendant S. S. Gordon, who was and is closely connected in a business and social way with said defendants Sanborn and Kendall, agreed to and did purchase sixty (60) shares of stock in said corporation, and one Frank Sanborn, who was and is the son of said defendant George W. Sanborn, agreed to and did purchase ten (10) shares of stock in said corporation; and that one G. C. Fulton, who was the attorney and legal adviser of said defendant Gordon and said defendant Sanborn, agreed to and did purchase twenty (20) shares

of stock in said corporation; and that said Kirberger, in accordance with his agreement, which he had made at the time of the organization of said corporation, to endeavor to interest his brother, A. C. Kirberger, in said corporation, did interest his said brother therein and did persuade and induce his said brother, A. C. Kirberger, to, and said A. C. Kirberger did, purchase sixty (60) shares of stock in said corporation;

FIFTH: Your orator further says he is informed and believes, and therefore charges it to be true, that at the time of the organization of said Kake Packing Company, the said defendants Sanborn and Gordon and Kendall well knew and had notice and knowledge of the fact, and reasonable cause to believe that said Kake Trading and Packing Company was a corporation and was not merely a private business owned and conducted by said Ernest Kirberger; that at the time of the organization of said Kake Packing Company the said Kake Trading and Packing Company, Bankrupt, as hereinbefore stated was the owner of valuable lands, buildings, water rights and other property situated in or near the village of Kake, in the Territory of Alaska, which it had been using for the packing and salting of fish, and other purposes, which said property was particularly and peculiarly valuable for use in the fishing industry;

SIXTH: Your orator further says he is informed and believes, and therefore charges it to be true, that at the time of the organization of said Kake Packing Company it was agreed by and between said defendants Gordon, Sanborn, and Kendall and said Kirberger that the latter should pay for and purchase eighty-five (85)

shares of stock in said corporation by causing the Kake Trading and Packing Company, Bankrupt, to convey, transfer and sell to said Kake Packing Company those certain lands, buildings, water rights, and other property hereinbefore mentioned; and that thereafter in furtherance of said plan and scheme which was contemplated by said agreement, said Kake Trading and Packing Company, Bankrupt, did convey said lands, buildings, water rights and other property to said Kake Packing Company, and as a consideration therefor the latter company then paid and delivered to said Kake Trading and Packing Company, Bankrupt, the sum of Eight Thousand Five Hundred (\$8,500.00) Dollars, which sum of money said Kake Trading and Packing Company, Bankrupt, through said Kirberger then immediately paid back into and to said Kake Packing Company, receiving in consideration therefor eighty-five (85) shares of stock in said Kake Packing Company; and your orator further says he is informed and believes, and therefore charges it to be true, that said shares of stock were taken and delivered in the name of said Ernest Kirberger, but that said eighty-five (85) shares of stock were in fact purchased with assets and property of the Kake Trading and Packing Company, Bankrupt, and did actually and in fact belong to and become its property, and although the same were taken and delivered in the name of Ernest Kirberger, said Kirberger held the same in trust for said bankrupt; and that they are now and did become the property of your orator as Trustee upon his election, appointment and qualification as such Trustee of said Kake Trading and Packing Company, Bankrupt;

SEVENTH: Your orator further says he is informed and believes, and therefore charges it to be true, that thereafter the said Kake Packing Company became indebted to said Kake Trading and Packing Company, Bankrupt, in the sum of Four Thousand (\$4,000.00) Dollars, which indebtedness arose out of mutual business relations and transactions occurring and taking place between said two corporations, and that in furtherance of said scheme and plan which was contemplated by the agreement made between said Sanborn, Gordon, Kendall and Kirberger, at the time of the organization of said Kake Packing Company, said Kake Packing Company did pay said indebtedness by paying to said Kirberger the sum of Four Thousand (\$4,000.00) Dollars, which said sum of money he then immediately paid back into and to said Kake Packing Company, receiving therefor forty (40) shares of stock in said Kake Packing Company; that said Kirberger was without right, power or authority to buy, or purchase, said forty (40) shares of stock in said Kake Packing Company, and your orator further says he is informed and believes, and therefore charges it to be true, that said Sanborn, Gordon and Kendall were well advised and had notice and knowledge of, and reasonable cause to believe, that said Kirberger was without any right, power or authority to buy or purchase said forty (40) shares of stock; that said forty (40) shares of stock so received by said Kirberger were purchased with assets and property of the Kake Trading and Packing Company, Bankrupt, and belonged to and became its property; that said forty (40) shares of stock were taken and delivered

in the name of said Ernest Kirberger, but said Kirberger held them in trust for said bankrupt; and they are now and did become the property of your orator as Trustee upon his election, appointment and qualification as such Trustee of said Kake Trading and Packing Company, Bankrupt;

EIGHTH: Your orator further says he is informed and believes, and therefore charges it to be true, that in all four hundred forty-five (445) shares of stock in said Kake Packing Company were subscribed for and that Forty-Four Thousand Five Hundred (\$44,500.00) Dollars, was actually paid in to said corporation in payment therefor; and that the remaining fifty-five (55) shares of stock were never sold or paid for.

NINTH: Your orator further says he is informed and believes, and therefore charges it to be true, that thereafter and on or about the 14th day of January, 1914, the said defendants Kendall and Sanborn, unlawfully and fraudulently and with the unlawful intent and purpose to defraud and deprive the Kake Trading and Packing Company, Bankrupt, and its creditors, of one hundred twenty-five (125) shares of stock in the Kake Packing Company, and with the unlawful intent and purpose to hinder, delay and defraud the creditors of said Kake Trading and Packing Company, Bankrupt, in the collection of their just and lawful claims and demands against said concern, entered into a conspiracy to obtain said one hundred twenty-five (125) shares of stock from said Ernest Kirberger, in whose name said stock then stood; that the time was very opportune for the carrying out and completion of said conspiracy inas-

much as the two prior fishing seasons during which the said Kake Packing Company had operated in the Territory of Alaska had not been profitable by reason of labor strikes, a small run of fish, low prices for salmon fish, and other circumstances which made a general depression in the fishing industry in the Territory of Alaska; that your orator further says he is informed and believes, and therefore charges it to be true, that said Sanborn and Kendall in order to carry out said conspiracy and scheme and plan, did coerce and induce said Kirberger, by unlawful threats, duress and undue influence, to, and said Kirberger did, assign, transfer and convey to said Kendall and Sanborn said one hundred twenty-five (125) shares of stock in said Kake Packing Company owned by said Kake Trading and Packing Company, Bankrupt, for the consideration of One (\$1.00) Dollar; which said amount was grossly inadequate and an insignificant sum to pay as a consideration for said stock; your orator further says he is informed and believes, and therefore charges it to be true, that at said time said Sanborn and Kendall and Kirberger well knew, and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, unlawfully and fraudulently deprive and defraud said Kake Trading and Packing Company and its creditors of said property and assets, and that it would unlawfully and fraudulently defraud, hinder and delay the creditors of said Kake Trading and Packing Company, Bankrupt, in the collection of their just and lawful claims and demands against said bankrupt, out of the assets of said bankrupt; and that at said time, the said Kake Trading and Packing Company was insolvent,

and said Kendall and Sanborn and Kirberger knew, and had reasonable cause to believe, that said Kake Trading and Packing Company was at said time insolvent.

TENTH: Your orator further says he is informed and believes, and therefore charges it to be true, that thereafter, in order to complete and consummate their said unlawful plan, scheme and conspiracy, the said Sanborn and Kendall caused a meeting to be held of the directors and stockholders of said Kake Packing Company at Astoria, Oregon, on or about the 11th day of May, 1914; that said defendants Sanborn and Kendall dominated said meeting and dictated and directed the manner in which the stock of said defendant Gordon and said Frank Sanborn and said G. C. Fulton should be voted, and caused said stock to be voted in accordance with their prearranged plan, and that said defendants Sanborn and Gordon constituted a majority of the directors of said Kake Packing Company, and that they in conjunction with said defendant Kendall and said Frank Sanborn and said G. C. Fulton controlled and influenced a majority of the stockholders of said Kake Packing Company, and at that time said defendants Kendall, Gordon and Sanborn held a majority of the stock of said corporation, and that said defendants Kendall and Sanborn further held the one hundred twenty-five (125) shares of stock belonging to the Kake Trading and Packing Company and the sixty (60) shares of stock belonging to the said A. C. Kirberger, which one hundred eighty-five (185) shares of stock at the time of said meeting ostensibly belonged to and stood in the name of said defendants Kendall and Sanborn, and of

which, at said time, they were in the control and possession and wrongfully and unlawfully voted in the same manner as if it rightfully belonged to them; and that at said meeting said defendants Sanborn and Gordon unlawfully and fraudulently, and in violation of the rights of the minority stockholders and of the Kake Trading and Packing Company, Bankrupt, as a minority stockholder, and in violation of their duties as directors of said Kake Packing Company, and with the connivance and assistance of said defendant Kendall, in accordance with said preconceived plan and scheme, caused all of the assets of said Kake Packing Company to be sold and conveyed to the said Sanborn Cutting Company, of which last named company at said time your orator says he is informed and believes, and therefore charges it to be true, that the said Sanborn and Kendall constituted a majority of the board of directors, and either owned or controlled through their friends and relatives a majority of the stock thereof; that said conveyance of the assets of said Kake Packing Company to said Sanborn-Cutting Company was made for a grossly inadequate consideration, and that the said Kake Trading and Packing Company, Bankrupt, was thereby deprived and defrauded of its said stock in the Kake Packing Company without any consideration being paid therefor at all, save the sum of One Dollar heretofore mentioned; that neither said Kake Trading and Packing Company, Bankrupt, nor this plaintiff as Trustee, has in any wise acquiesced in, ratified or assented to said sale and conveyance, but that, on the contrary, they have expressly disapproved and discountenanced the same, and that said Ernest Kirberger was without right, power or

authority to acquiesce in, ratify or assent to the same for and on behalf of said Kake Trading and Packing Company, and that at said time defendants Kendall and Sanborn were in possession by unlawful and fraudulent means and devices, of said one hundred twenty-five (125) shares of stock of the said Kake Trading and Packing Company, Bankrupt, and were without right, power or authority to vote the same for and on behalf of said Kake Trading and Packing Company, or at all;

ELEVENTH: Your orator further says he is informed and believes, and therefore charges it to be true, that said defendants Kendall and Sanborn do now, and at all times since said 11th day of May, 1914, have continued to hold said one hundred twenty-five (125) shares of stock in the Kake Packing Company of and belonging to said Kake Trading and Packing Company, Bankrupt, and its proceeds, or stock of the defendant Sanborn Cutting Company issued in lieu thereof; and that by reason of said sale and conveyance of its assets to the said Sanborn Cutting Company, the said Kake Packing Company was forced to and did discontinue its business and fishing industry at Kake, in the Territory of Alaska, and that since said time the said Sanborn Cutting Company has wrongfully and unlawfully used, and does now continue to use, the assets, plant, building and other property of said Kake Packing Company in the operation and carrying on of said business at or near the village of Kake, in the Territory of Alaska; and that said Sanborn Cutting Company has made lucrative and extensive profits out of said business during the fishing seasons of 1914 and 1915, and that it has in no

wise accounted to said Kake Trading and Packing Company, Bankrupt, or to said Kake Packing Company, or to this plaintiff as Trustee, for said profits.

TWELFTH: Your orator further says he is informed and believes, and therefore charges it to be true, that said defendants Kendall and Sanborn will claim that said assignment of one hundred twenty-five (125) shares of stock of the Kake Packing Company belonging to the Kake Trading and Packing Company, Bankrupt, was made in good faith and for a valuable consideration and that said Ernest Kirberger was authorized to make said assignment, and that said Ernest Kirberger was attempting by and through the means of said assignment to secure an option on the stock of said defendant Kendall and Sanborn, and control of said Kake Packing Company and its assets, and that said Kirberger failed and neglected to and did not perform the covenants and agreements of said assignment to be kept and performed by him; but your orator further says he is informed and believes, and therefore charges it to be true, that said assignment was skillfully and cunningly drawn to purport to be simply an assignment and not an option and that untruthful and false statements are set forth in said paper, and that said Kirberger did not understand or realize, and was incapable of understanding and realizing, the legal effect of said assignment, and did not have the advice of counsel as to its effect before he executed the same, and furthermore, that said Kirberger was in such a state of mind that he was under great illusions as to the profits to be made in the fishing industry and that he had cherished

the wish to operate a fishing business at Kake, Alaska, for such a long period of time that he was not in a proper frame of mind to enable himself to distinguish the disadvantages and burdens placed upon him by said defendants Sanborn and Kendall, or to realize the difficulties to be encountered in performing and keeping the terms of the assignment he was persuaded to make by said defendants Sanborn and Kendall; and that he labored under a great and serious disadvantage in that he had the highest opinion as to, and greatest confidence in, the integrity and reliability of said defendants Sanborn and Kendall and was unduly influenced by them; and your orator further says he is informed and believes, and therefore charges it to be true, that said defendants Sanborn and Kendall are shrewd business men and well knew the effect of said purported assignment and had the advice of able and learned counsel as to the making of the same, and that the terms and forfeitures of said assignment are unjust, harsh and inequitable, and that the consideration therein provided is grossly inadequate, and that said Kirberger had no right, power or authority to make or enter into the same, and that so far as plaintiff and the Kake Trading and Packing Company, Bankrupt, is concerned, there was no consideration whatever, and that said assignment was not mutual but solely for the benefit of said defendants Kendall and Sanborn, and the defendant Sanborn Cutting Company; and that by and through the means of said assignment, said Kirberger did unlawfully and fraudulently transfer, convey and assign away assets and property of said Kake Trading and Packing Company, Bankrupt, and did thereby hinder, delay and de-

fraud, and is now hindering, delaying and defrauding the creditors of said Kake Trading and Packing Company in the collection of their just and lawful claims and demands against it, and that at said time the said Kake Trading and Packing Company was insolvent, and that the said Kendall and Sanborn and Kirberger well knew, and had knowledge and notice and reasonable cause to believe prior to and at the time of making said assignment, that said Kake Trading and Packing Company was insolvent and that said assignment would hinder, delay and defraud the creditors of said Kake Trading and Packing Company.

THIRTEENTH: Your orator further says he is informed and believes, and therefore charges it to be true, that said defendants Kendall and Gordon and Sanborn and said defendant Sanborn Cutting Company will claim that an adequate consideration was given for the conveyance and sale of the assets of the Kake Packing Company to the Sanborn Cutting Company in that said defendant Sanborn Cutting Company agreed to pay all the liabilities of said Kake Packing Company and that the assets and property of said Kake Packing Company were not worth more, or of a greater value, than its liabilities at said time; but your orator further says he is informed and believes, and therefore charges it to be true, that said defendant Sanborn Cutting Company has not paid all the liabilities of said Kake Packing Company and that said consideration was grossly inadequate, and that the property and assets of said Kake Packing Company were far more valuable than its liabilities at said time; that the fishing

industry in which said business the Kake Packing Company was engaged is to a great and peculiar degree a speculative business and that the financial condition at the close of one season is not a criterion of the actual value of such a business; and that at the time of making of said conveyance a general depression had taken place and existed in the fishing business in the Territory of Alaska, and that nearly all persons engaged in that industry were suffering alike therefrom and that defendants Kendall, Gordon and Sanborn and Sanborn Cutting Company well knew of said facts, and well knew of the probability of said Kake Packing Company being able to continue said business and therein earn great and lucrative profits; and your orator further says he is informed and believes, and therefore charges it to be true, that said defendants Kendall, Gordon and Sanborn and Sanborn Cutting Company fraudulently and unlawfully caused said conveyance and sale to be made in violation of the duties of said defendants Gordon and Sanborn as directors of, and in violation of, and in detriment to the rights of the minority stockholders in, said Kake Packing Company, a corporation, and that at said time said defendants Kendall and Sanborn were unlawfully and fraudulently in possession of, and the holders and ostensibly the owners of, said one hundred twenty-five (125) shares of stock of the Kake Trading and Packing Company, Bankrupt, and of said sixty (60) shares of stock of said A. C. Kirberger in the Kake Packing Company; and that neither they, nor either of them, had any right, power or authority to in any wise acquiesce in, ratify or assent to said conveyance or sale for and on behalf of said Kake Trading and Packing Company or

to vote its stock, and that said conveyance and sale did hinder, delay and defraud, and is now hindering, delaying and defrauding the creditors of said Kake Trading and Packing Company, Bankrupt, in the collection of their lawful and just demands and claims against it, as well as the creditors of the said Kake Packing Company in the collection of their just claims and demands against it, and that no consideration whatsoever was paid for said one hundred twenty-five (125) shares of stock belonging to said Kake Trading and Packing Company, Bankrupt, save One Dollar as heretofore mentioned.

FOURTEENTH: Your orator further says he is informed and believes, and therefore charges it to be true, that the said defendant Kake Packing Company and the said defendant Sanborn Cutting Company are now and do remain under the control and influence of said Kendall, Gordon and Sanborn, and that said defendant Kake Packing Company will not, so long as said corporations remain under the influence and control of said defendants Kendall and Sanborn, take any steps to avoid and set aside said conveyance and sale, or to recover back its property and assets so conveyed to and appropriated by said defendant Sanborn Cutting Company as aforesaid; and a demand upon them as directors of such Kake Packing Company to institute suit for such purpose would be of no avail whatever; that by and through the acts and deeds of said defendants Kendall, Gordon and Sanborn, Kake Packing Company and Sanborn Cutting Company, your orator as Trustee for the said Kake Trading and Packing Company,

Bankrupt, and the creditors of said bankrupt, have been defrauded and deprived of the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars, together with the proceeds thereof, from May 11, 1914, and that the amount due your orator as Trustee exceeds the sum of Three Thousand (\$3,000.00) Dollars; and that your orator is without any adequate relief at law, and he offers to do whatever equity requires in the premises so far as he is authorized to do, under the Acts of Congress relative to bankruptcy, and that he herewith tenders and returns the sum of One (\$1.00) Dollar, the consideration paid by said defendants Kendall and Sanborn to said Kirberger as consideration for the making of said assignment.

WHEREFORE, your orator prays that the said defendant Sanborn Cutting Company be required to make and render an accounting of its operation and conducting of the defendant Kake Packing Company's business since May 11, 1914, and that said defendant Sanborn Cutting Company be required to restore and return said business and the assets thereof, together with the earnings thereof, to the said defendant Kake Packing Company; and that the said defendants Kendall and Sanborn be required to make and render an accounting of said one hundred twenty-five (125) shares of stock of the Kake Packing Company belonging to the Kake Trading and Packing Company, Bankrupt, and that the said defendant Kake Packing Company transfer the same on its books to your orator as Trustee for the Estate of Kake Trading and Packing Company, Bankrupt, and that said de-

fendants Kendall and Sanborn be required to restore the same to your orator, together with the proceeds and profits thereof, or that your orator have judgment against said Kendall, Gordon and Sanborn and Sanborn Cutting Company and each of them, for the sum of Twelve Thousand Five Hundred (\$12,500.00) Dollars, together with the profits accruing on said one hundred twenty-five (125) shares of stock since May 11, 1914, and for his costs and disbursements herein; and that the defendants and each of them be required to answer all and singular the matter above stated; and that a writ of subpoena may be granted to your orator to be directed to the defendants and each of them, thereby requiring the said defendants and each of them personally to appear on a certain day before the Court, and then and there, full, true and direct and perfect answer make to all and singular the premises, an answer under oath being hereby expressly waived, and further to perform and abide by such further order, direction or decree therefor as to the Court shall seem meet; and that your orator have such other and further relief as the Court may deem proper and equitable.

GUNNISON & ROBERTSON,

of Juneau, Alaska.

and

JAMES J. CROSSLEY,

of Portland, Oregon.

Solicitors and Counsel for Complainant.

United States of America,
Territory of Alaska,
Division Number One,—ss.

On this 12th day of October, 1915, before me, personally appeared V. A. Paine, Trustee of the Estate of the Kake Trading and Packing Company, a corporation, bankrupt, the complainant above named, who being by me first duly sworn on oath, deposes and says: That he is the Trustee of the Estate of the Kake Trading and Packing Company, a corporation, bankrupt, and familiar with its business, and that by reason of his said appointment as Trustee the shares of stock belonging to said bankrupt in the Kake Packing Company have devolved upon him by operation of law; and the foregoing action is not a collusive suit to confer on the Court of the United States jurisdiction of a case of which it would not otherwise have cognizance; and that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

V. A. PAINE.

Subscribed and sworn to before me this 12th day of October, 1915.

R. E. ROBERTSON,
Notary Public in and for the Territory of Alaska.
(Seal)

My commission expires June 19, 1917.
Filed December 6, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 11th day of February, 1916, there was duly filed in said Court, and cause, a Separate Answer of the Sanborn Cutting Company, in words and figures as follows, to-wit:

ANSWER OF SANBORN - CUTTING COMPANY.

Comes now the above named defendant Sanborn-Cutting Company, sued herein as Sanborn Cutting Company, for itself alone answering unto the bill of complaint of the above named plaintiff, admits, alleges and denies as follows, that is to say:

I.

This defendant alleges that the true name of this defendant is, and ever has been, Sanborn-Cutting Co., and that this defendant is, and during all the times mentioned in plaintiff's bill of complaint and at all times herein mentioned was, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Astoria, in Clatsop County, in said state.

II.

This defendant answering unto the First paragraph of plaintiff's bill of complaint alleges that it has no knowledge or information concerning any allegation contained in said paragraph, and therefore demands proof thereof, should this Court determine that proof is necessary in this case.

III.

This defendant answering unto the Second paragraph of said bill of complaint alleges that it is informed that the said Kake Packing Company is and was a corporation accordingly as therein alleged, and admits that this defendant is a corporation organized and existing under and by virtue of the laws of the State of Oregon, and a resident and citizen of said state, and that it is engaged in business in the Territory of Alaska, and has been since May 12, 1914, but not prior thereto.

IV.

This defendant answering unto the Third paragraph of said bill of complaint alleges that it has no knowledge or information as to any allegation therein contained, and therefore denies the same on information and belief.

V.

This defendant answering unto the Fourth paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation therein contained, and therefore denies the same on information and belief.

VI.

This defendant answering unto the Fifth paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation therein contained, and therefore denies the same on information and belief.

VII.

This defendant answering unto the Sixth paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation therein contained, and therefore denies the same on information and belief.

VIII.

This defendant answering unto the Seventh paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation therein contained, and therefore denies the same on information and belief.

IX.

This defendant answering unto the Eighth paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation therein contained, and therefore denies the same on information and belief.

X.

This defendant answering unto the Ninth paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation therein contained, and therefore denies the same on information and belief.

XI.

This defendant answering unto the Tenth paragraph of said bill of complaint denies the same, and the whole

thereof, and each and every allegation therein contained, save and excepting this defendant, admits that on May 12, 1914, the Kake Packing Company, by a conveyance in writing, duly executed, witnessed and acknowledged, conveyed to this defendant the entire assets of such corporation. That the agreed consideration therefor was the sum of \$72,621.01, the amount of certain indebtedness of Kake Packing Company, excepting a claim of defendants F. P. Kendall and George W. Sanborn, which the said Ernest Kirberger mentioned in plaintiff's complaint represented to aggregate, but, as a matter of fact, the statements made by said Ernest Kirberger were incorrect. That the actual amount of the claims assumed by defendant which said Ernest Kirberger, as president of said corporation, Kake Packing Company, represented aggregated only \$72,621.01, as a fact, aggregated the sum total of \$81,177.18, which defendant paid, accordingly as hereinafter mentioned.

XII.

This defendant answering unto the Eleventh paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation therein contained, and therefore denies the same on information and belief.

XIII.

This defendant answering unto the Twelfth paragraph of said bill of complaint alleges that it has no knowledge or information of or concerning any allegation in said paragraph contained; therefore, denies the

same; and this defendant avers that defendant has nothing whatever to do with the matters and things therein alleged other than this defendant admits it did purchase from said Kake Packing Company, for the consideration of \$81,177.18, Gold Coin of the United States well and truly paid said Kake Packing Company and to its order, its entire assets, and this defendant further alleges that it is untrue and denies that this defendant participated in any of the transactions therein alleged, and denies that any assignment was made to either George W. Sanborn or F. P. Kendall, or any other person, of any claim or demand, or any stock, by or through any knowledge or connivance on the part of this defendant, and denies that this defendant participated in any transaction therein alleged, excepting the purchase of the assets of the Kake Packing Company. This defendant further avers that the purchase by this defendant of the assets of said Kake Packing Company was made in good faith and for the consideration herein expressed, and in the ordinary course of business, and not otherwise.

XIV.

This defendant answering unto the Thirteenth paragraph of said bill of complaint denies the same, and the whole thereof, and each and every allegation therein contained, save and excepting this defendant admits that it has ever contended, and still contends, that the sale to it and the transfer to it by the said Kake Packing Company of its assets was made for a valuable consideration and in good faith, and in the ordinary course

of business, and without any knowledge on the part of this defendant that either of the parties thereto were acting other than honestly and in good faith, and without notice or knowledge of any of the business relations between the said Ernest Kirberger and the Kake Trading and Packing Company.

XV.

This defendant answering unto the Fourteenth paragraph of said bill of complaint denies the same, and the whole thereof, and each and every allegation therein contained, save and excepting this defendant admits that the defendants F. P. Kendall and George W. Sanborn own the majority of the stock in this corporation, but did not own the majority at the time the transaction set forth and alleged in plaintiff's bill of complaint took place, but this defendant knows nothing whatever concerning the affairs of the Kake Packing Company, or who owns or controls the same.

FIRST AFFIRMATIVE DEFENSE.

This defendant for a further and separate answer and affirmative defense to the matters and things set forth in plaintiff's bill of complaint alleges:

I.

That the said plaintiff ought not be permitted to allege, claim or plead that the sale and conveyance to this defendant of the properties and assets of the Kake Packing Company was fraudulent or void, or in fraud

of the rights of the creditors, or any creditor, of the Kake Packing Company, and ought not be permitted to allege, claim or plead that the same should be set aside, and that such property should be restored to the Kake Packing Company, but is and ought to be estopped from so contending, claiming or pleading, for that this defendant honestly and in good faith purchased of and from the Kake Packing Company all of its said assets and properties described in plaintiff's bill of complaint for the consideration of \$81,177.18, paying said sum in full in United States Gold Coin to said Kake Packing Company and to its order, and which said sum the said Kake Packing Company duly received from this defendant and which sum was applied to the payment of the indebtedness of such corporation, and that the said plaintiff has not offered to repay to said defendant said consideration, and has not tendered the said sum into Court for the use of this defendant, or for a transfer of such properties to the plaintiff herein, as provided by the laws of the United States and the rules of equity in such cases made and provided.

SECOND AFFIRMATIVE DEFENSE.

This defendant for a further and separate answer and affirmative defense to the matters and things set forth and alleged in plaintiff's bill of complaint alleges:

I.

That heretofore, and on and prior to the 12th day of May, 1914, the defendant Kake Packing Company,

through its President and General Manager, Ernest Kirberger, and the officers of such corporation, offered to sell and convey to this defendant the entire assets of such corporation, which said assets consisted of a cannery situated at and near Kake, in the Territory of Alaska, and certain fishing appliances and fishing locations and possessory rights to real estate, being the property belonging to such defendant Kake Packing Company described in plaintiff's bill of complaint, for the sum of \$72,621.01, which sum said officers of said Kake Packing Company represented to this defendant was the total amount of its liabilities, with the exception of a claim of \$8,582.21, which was then owned by the defendants F. P. Kendall and George W. Sanborn and being a claim for goods, wares and merchandise which the Kake Trading and Packing Company had sold and delivered to the Kake Packing Company and which had been theretofore assigned by said Kake Trading and Packing Company to defendants F. P. Kendall and George W. Sanborn, and the said F. P. Kendall and George W. Sanborn agreed to cancel and discharge such indebtedness to this defendant, if defendant should consent to purchase said properties and to pay therefor the said sum of \$72,621.01, and thereupon, the said officers of such corporation delivered to this defendant a statement, which the said Kake Packing Company, through its officers, represented contained the true names of all of the creditors of said Kake Packing Company, with the true amount due each. That said claims aggregated said sum of \$72,621.01. Thereupon this defendant agreed to purchase said properties for said sum,

and thereupon, on the 12th day of May, 1914, the said Kake Packing Company executed and delivered to this defendant a good and sufficient deed of conveyance, wherein and whereby such corporation conveyed to this defendant the entire assets of such corporation, and being the property set forth and described in plaintiff's bill of complaint, and being the same conveyance described in plaintiff's bill of complaint and therein complained of. That prior to the execution of such conveyance, the sale of said property and the execution and delivery of said conveyance was duly authorized both by the stockholders of said corporation and by the Board of Directors of said corporation at meetings duly called pursuant to the laws of the State of Oregon and the by-laws of such corporation. That upon the delivery of said deed of conveyance, the said Kake Packing Company, through its officers, delivered to this defendant a statement accordingly as aforesaid, which it was represented to this defendant contained the names of all the creditors of said Kake Packing Company and the true amount due each creditor, said claims aggregating the said sum of \$72,621.01, and thereupon this defendant agreed to pay said claims in full, and in accordance therewith did pay and satisfy each and all claims in full. That the said statement made to this defendant by said Kake Packing Company, through its officers, was incorrect, in that the amount stated to be due its said creditors showed an indebtedness of \$72,621.01, when, as a matter of fact, the amount due the creditors named in said statement, the payment of which was assumed by this defendant, aggregated in fact \$81,177.18, and

this defendant was compelled to and did pay said sum. That said sum was and is the true consideration which this defendant paid for the sale and transfer to it of the assets of such corporation. That said sale was consummated on the 12th day of May, 1914, long prior to the institution of any proceedings against the Kake Trading and Packing Company to have it adjudicated a bankrupt.

That at the time this defendant purchased said properties, it had no notice or knowledge of any business transactions occurring between said Ernest Kirberger and the Kake Trading and Packing Company, and before making the said purchase, it was fully advised as to the authorization of such sale both by the stockholders of such corporation and the directors thereof.

That at the meeting of the stockholders of such corporation authorizing such sale, said Ernest Kirberger was present and voted the 125 shares of stock described in plaintiff's bill of complaint, and that at the meeting of the directors of such corporation authorizing such sale, said Ernest Kirberger was present and voted in favor thereof.

Therefore, the said plaintiff herein, as Trustee of the Kake Trading and Packing Company, and the said Kake Trading and Packing Company ought to be and is estopped from contending, alleging or pleading that the sale of said properties to this defendant was fraudulent or void, and from contending, alleging or pleading that the same should be set aside and the said properties resold to the plaintiff herein.

II.

This defendant further alleges that said transaction wherein this defendant purchased the assets of said corporation Kake Packing Company was a straightforward, honest transaction, and that it was made in good faith and for the consideration herein expressed, and without any notice or knowledge on the part of this defendant of any of the alleged matters and things set forth and alleged in plaintiff's bill of complaint.

That immediately upon the delivery of said deed of conveyance of date May 12, 1914, this defendant entered into the possession of the properties so conveyed to it, and operated said cannery during the salmon fishing seasons for the years 1914 and 1915, and this defendant stands ready at any time to establish before this Court whatever profits this defendant derived therefrom.

THIRD AFFIRMATIVE DEFENSE.

This defendant for a further and separate answer and affirmative defense to the matters and things set forth and alleged in plaintiff's bill of complaint alleges:

I.

That this defendant is, and during all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Astoria, in Clatsop County, in said state, and duly licensed to engage in business both in the State of Oregon and in the Territory of Alaska.

II.

That on the 6th day of December, 1915, the above named plaintiff, as Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt, as plaintiff, filed in the District Court for the District of Alaska, Division Number One, at Juneau, his complaint in words and figures following, to-wit:

*“In the District Court for the District of Alaska,
Division Number One, at Juneau.*

V. A. Paine, as Trustee in Bankruptcy of the
Kake Trading and Packing Company, a
corporation, bankrupt,

Plaintiff,

vs.

Kake Packing Company, a corporation, and
Sanborn Cutting Company, a corporation,
Defendants.

No. 1405-A. COMPLAINT.

Comes now the above named plaintiff as Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt, and, for cause of action, alleges:

I.

That plaintiff brings this action on behalf of himself as Trustee and on behalf of all other creditors of the defendant Kake Packing Company, similarly situated who may desire to join herein and pay their proportionate share of the costs hereof.

II.

That heretofore, to-wit: on the 9th day of April, 1915, the Kake Trading and Packing Company, a corporation, was duly declared and adjudicated a bankrupt by the United States District Court for the District of Alaska, Division Number One, at Juneau, the Honorable Robert W. Jennings, Judge presiding, sitting in Bankruptcy in said court, and thereafter and on the 8th day of May, 1915, plaintiff was duly elected and appointed Trustee in Bankruptcy of said Kake Trading and Packing Company, a corporation, bankrupt, and thereafter plaintiff duly qualified as such Trustee, and has been at all times since and is now the duly appointed, elected, qualified and acting Trustee in Bankruptcy of said Kake Trading and Packing Company, a corporation, bankrupt.

III.

That the above named defendant Kake Packing Company was at all the times hereinafter mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and that it has filed in the office of the Clerk of the District Court of the District of Alaska, at Juneau, a certified copy of its purported Articles of Incorporation, financial statement and appointment and consent of resident agent in Alaska; that said defendant corporation has not filed, or caused to be filed, said papers or any of them in the office of the Secretary of the Territory of Alaska; and that said defendant corporation has not paid to the Territory of Alaska its annual license

fees last due, for the years 1913, 1914, 1915 and 1916, or for any of said years.

IV.

That the above named defendant Sanborn Cutting Company was at all the times hereinafter mentioned and is now a corporation duly organized and existing under the laws of the State of Oregon; that said defendant corporation has not filed, or caused to be filed, in the office of the Clerk of the District Court at Juneau, or in the office of the Secretary of the Territory of Alaska, or in either of said offices, financial statement or report, or appointment and consent of resident agent, or either or any of said papers; that said defendant corporation has not paid to the Territory of Alaska its annual license fees last due for the years 1913, 1914, 1915 and 1916, or for any of said years; that said defendant is now and has been at all times since on or about May 12, 1914, engaged in and operating and doing business in the First Division of the Territory of Alaska, and within the jurisdiction of this Court.

V.

That immediately upon the election, appointment and qualification of plaintiff as such Trustee of said Kake Trading and Packing Company, a corporation, bankrupt, he became the owner as such Trustee of all the property and assets of said bankrupt, including the debt hereinafter referred to, and has been at all times since and is now under and by virtue of the Acts of Congress relating to bankruptcy and the laws of the United

States and the Territory of Alaska, the owner of and entitled to the possession of all the property and assets, including the debt hereinafter referred to, of said bankrupt; and that the said debt hereinafter referred to is an asset of said estate in bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt, and that plaintiff as such Trustee is now the owner thereof.

VI.

That on the 27th day of August, 1915, at Juneau, Alaska, judgment was rendered against the above named defendant, Kake Packing Company, for the sum of Ten Thousand Three Hundred Thirty-three and 31/100 (\$10,333.31) Dollars, with interest at the rate of Eight (8%) per cent per annum from the 31st day of January, 1915, in a certain action No. 1328-A, brought by the plaintiff in the above entitled court, entitled "V. A. Paine, as Trustee of the Estate of Kake Trading and Packing Company, a corporation, Bankrupt, plaintiff, vs. Kake Packing Company, a corporation, defendant," which judgment was thereafter duly docketed in the records of said court; that a copy of said judgment is hereunto annexed, marked Exhibit "A," and specifically made a part hereof.

VII.

That on the 31st day of August, 1915, an execution was issued in said cause upon said judgment against said defendant Kake Packing Company, addressed to the United States Marshal for the First Division of

the Territory of Alaska, in which Division of said Territory the said Kake Packing Company did, as hereinbefore stated, file with the Clerk of the District Court its Articles of Incorporation, financial statement and appointment and consent of resident agent, and in which division of said Territory said corporation did formerly conduct, carry on and operate its business, and in which said Division and Territory the said property hereinafter described is located.

VIII.

That said execution has been returned by said United States Marshal wholly unsatisfied and no property found.

IX.

That on or about the 12th day of May, 1914, the said defendant Kake Packing Company, which was at said time wrongfully, unlawfully and fraudulently dominated and controlled by the defendant Sanborn Cutting Company, did wrongfully, unlawfully and fraudulently and with the intent to hinder, delay and defraud the creditors of it, the said Kake Packing Company, and particularly with intent to hinder, delay and defraud the said Kake Trading and Packing Company, convey, by a bill of sale, duly delivered, a copy of which is hereunto annexed marked Exhibit "B," and specifically made a part hereof, all of its assets and its entire assets, including the following described property, to-wit: All goods, wares, merchandise and chattels of every kind, nature and description owned by it, or in which it has,

or claims to have, any right, title, interest or equity; all lumber, salmon, both canned and pickled, nets, web, tins, tin cans, twine, gasoline and cannery supplies, and all cannery buildings, warehouses, bunkhouses, and dwelling houses, and its entire cannery plant situate at or near Kake, in the Territory of Alaska, and all machinery, tools, implements and equipment therein contained, or used in or about the conducting of its business there, and all boats, scows, traps and trap sites, and all trap paraphernalia, web, piles, pots, hearts and leads; all property of every kind, nature and description owned by, or in which it has any right, title, interest or estate whatsoever situate and wheresoever located; all right, title, interest and estate which it has of, in or to all property, both real and personal, owned, or claimed to be owned by it, or in which it has any right, title, interest, estate or equity wheresoever situate, both at Astoria, Oregon, and in Alaska, including bills receivable and choses in action, water rights, conduits and water privileges, unto the said defendant Sanborn Cutting Company; that at said time the said Kake Trading and Packing Company, bankrupt, of which plaintiff is now the Trustee in Bankruptcy as aforesaid, was a creditor of said defendant Kake Packing Company.

X.

That said conveyance purports to have been made for an alleged consideration of Seventy-two Thousand Six Hundred Twenty-one and 1/100 (\$72,621.01) Dollars, but that in truth and in fact the said defendant Sanborn Cutting Company is not a bona fide purchaser

of said property for a valuable consideration, and did not pay a valuable, or any, consideration for said property as against said Kake Trading and Packing Company, or this plaintiff, its Trustee in Bankruptcy, but that to the contrary it, the Sanborn Cutting Company, took said property with full notice and knowledge of said fraudulent intent and purpose of the said Kake Packing Company, and with the intent to assist and aid the said defendant Kake Packing Company in hindering, delaying and defrauding its creditors, and particularly in hindering, delaying and defrauding the said Kake Trading and Packing Company, of the collection and payment of their just and lawful claims and demands against it; that the directors of said two defendant corporations did, on or about said day, unlawfully, wrongfully and fraudulently scheme and conspire together with the particular intent and purpose to defraud the Kake Trading and Packing Company out of, and from obtaining payment of, its said debt against the Kake Packing Company, and, in pursuance to said conspiracy and scheme, did cause said conveyance to be made; that, at the time of making of said conveyance, the majority of the stock of said Kake Packing Company was wrongfully, unlawfully and fraudulently controlled and dominated by the owners of the majority of the stock of said defendant Sanborn Cutting Company; and at said time the Board of Directors or Trustees of said defendant Kake Packing Company was wrongfully, unlawfully and fraudulently dominated and controlled by the Board of Directors or Trustees of said defendant Sanborn Cutting Company; that at said time

two of the Directors or Trustees of said defendant Sanborn Cutting Company were owners of the majority of the stock of said Sanborn Cutting Company and did wrongfully, unlawfully and fraudulently dominate, control, hold, dictate and use for their own purposes and benefits, the majority of stock in said Kake Packing Company; and that at said time one of said Directors or Trustees of the defendant Sanborn Cutting Company was a director of the defendant Kake Packing Company; and that said defendant Sanborn Cutting Company did wrongfully, unlawfully and fraudulently cause and compel said Kake Packing Company to convey unto it all of its assets, including the property hereinbefore described, with the intent and purpose to obtain the same without the payment of any consideration therefor save the payment of certain debts of the Kake Packing Company, which did not include the debt due the said Kake Trading and Packing Company, and with the intent and purpose to hinder, delay and defraud all the other creditors of said defendant Kake Packing Company and particularly to hinder, delay and defraud the Kake Trading and Packing Company; and that said defendant Kake Packing Company did wrongfully, unlawfully and fraudulently convey said property to said defendant Sanborn Cutting Company with the intent and purpose as aforesaid, and the said Sanborn Cutting Company did receive and does now hold said property with full knowledge and notice: (a) that the said Kake Packing Company did at said time and still does owe just and lawful debts which had not at said time and have not since been paid; (b) that creditors of said defendant Kake Packing Company would be and are now

being hindered, delayed and defrauded in the collection of said just and lawful debts; and the defendant Sanborn Cutting Company wrongfully, unlawfully and fraudulently took and received and now holds said property with full knowledge and notice that said property was and is subject to the payment of the lawful claims and demands of the creditors of said defendant Kake Packing Company; and plaintiff further alleges that said property was and is equitably subject to the payment of the debts of said Kake Packing Company.

XI.

That practically all of said property hereinbefore described was at the time of making of said conveyance, has been at all times since and is now situate in the First Division of the Territory of Alaska, and within the jurisdiction of this Court; that the said defendant Sanborn Cutting Company at all times since has been and is now in possession of the said hereinbefore described property and has been at all times since and is now using, operating and conducting the same for its own use, advantages and profits, and that it has made large and remunerative profits and earnings out of the use and operation thereof; and that it claims and pretends to be the owner of said property by virtue of said conveyance.

XII.

That there are and exist a large number of unpaid creditors of the said Kake Trading and Packing Company, Bankrupt, and that said creditors have filed in

said Bankruptcy proceedings proof of their said claims and demands, and that the assets of said bankrupt, efficient to pay in full the lawful claims and demands of exclusive of said debt hereinbefore mentioned, are not sufficient creditors of said bankrupt.

XIII.

That the said creditors of said Kake Trading and Packing Company, a corporation, bankrupt, have been and are now being hindered, delayed and defrauded in the collection of their said lawful claims and demands against said bankrupt by reason of said wrongful, unlawful and fraudulent conveyance.

XIV.

That the Kake Trading and Packing Company, a corporation, bankrupt, and plaintiff as its Trustee in Bankruptcy, have been and are now being hindered, delayed and defrauded in the collection of the said lawful debts, for which judgment was recovered as aforesaid, against said defendant Kake Packing Company, by reason of said wrongful and fraudulent conveyance.

XV.

That the creditors of said Kake Trading and Packing Company, a corporation, bankrupt, will be permanently hindered, delayed and defrauded in the collection of their said lawful claims and demands against the bankrupt, and the said bankrupt and this plaintiff as its Trustee in Bankruptcy will be permanently hindered,

delayed and defrauded in the collection of their just claim, for which judgment was recovered as aforesaid, against said defendant Kake Packing Company, unless this Honorable Court require and command said defendant Sanborn Cutting Company to reconvey to said defendant Kake Packing Company the said property hereinbefore described, or decree that said property is held by said defendant Sanborn Cutting Company subject to the unpaid debts of said defendant Kake Packing Company, and that sufficient thereof be sold to pay said unpaid debts; or decree that said defendant Sanborn Cutting Company pay the unpaid debts of said defendant Kake Packing Company, including the said judgment recovered by plaintiff.

XVI.

That no part of said judgment has been paid and the whole thereof is due, and that there is now actually and equitably due the plaintiff as Trustee upon said Judgment, and the debt upon which said judgment was recovered, the sum of Ten Thousand Three Hundred Thirty-three and $31/100$ (\$10,333.31) Dollars, with interest from the 31st day of January, 1915, and costs in said suit No. 1328-A, amounting in all at the date of said judgment to the sum of Ten Thousand Eight Hundred Twenty-three and $14/100$ (\$10,823.14) Dollars, together with interest thereon from the date of said judgment; and that plaintiff has exhausted his remedies at law.

WHEREFORE plaintiff prays that it be adjudged and decreed by the Court:

I. (a) That the conveyance of the assets of the Kake Packing Company to Sanborn Cutting Company is null and void, and requiring the said Sanborn Cutting Company to account for the use thereof and for the earnings and profits thereof and to make restitution of said assets, and of the profits and earnings thereon, to the said Kake Packing Company;

(b) Or, if restitution thereof cannot be had, that said property is held by said Sanborn Cutting Company subject to the debts of said Kake Packing Company and that sufficient of the same be sold to satisfy the unpaid debts of said Kake Packing Company, including the judgment recovered by plaintiff against said Kake Packing Company, or any execution issued thereon;

(c) Or, if neither restitution nor sale thereof sufficient to satisfy said debt can be had, that said defendant Sanborn Cutting Company be required to pay the unpaid debts of said Kake Packing Company, including the said judgment recovered by this plaintiff, and for decree and judgment against said Sanborn Cutting Company in the sum of Ten Thousand Eight Hundred Twenty-three and 14/100 (\$10,823.14) Dollars, with interest from August 27, 1914.

II. For his costs and disbursements herein.

III. For such other and further relief as may be meet and proper according to justice and equity.

GUNNISON & ROBERTSON,

Attorneys for Trustee, V. A. Paine, Plaintiff.

EXHIBIT "A."

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

V. A. Paine, as Trustee of Estate of Kake
Trading and Packing Company, a corporation, Bankrupt,

Plaintiff,

vs.

Kake Packing Company, a corporation,

Defendant.

No. 1328-A. JUDGMENT.

Now on this day this matter coming on for hearing upon the motion of the plaintiff for judgment to be entered herein, said plaintiff appearing by his attorneys, Messrs. Gunnison and Robertson, and defendants appearing not; and it appearing to the Court that heretofore, to-wit: on July 10, 1915, complaint was filed herein, and that thereafter and on said day summons was duly issued commanding said defendant to be and appear in this Court at Juneau, within thirty days from the date of the service of said summons and a copy of said complaint upon it; and it further appearing that thereafter, and on July 13, 1915, said summons, together with a copy of said complaint, was duly served upon said defendant, and it further appearing that thereafter and on the 23rd day of August, 1915, on application of said plaintiff, the said defendant having in no wise appeared herein and more than thirty days having ex-

pired since the time of the service of the said summons upon it, the Clerk of this Court duly entered the default of said defendant; and said defendant now in no wise having appeared and answered plaintiff's complaint, is in default, and the Court being now fully advised in the premises:

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that the said plaintiff do have and recover judgment against said defendant for the sum of Ten Thousand Three Hundred Thirty-three and Thirty-one Cents (\$10,333.31) Dollars, with interest at the rate of Eight per centum per annum from the 31st day of January, 1915, and for his costs and disbursements herein incurred, taxed at the sum of Seventeen and 60/100 (\$17.60) Dollars.

Let execution issue in accordance herewith.

Done in open Court this the 27th day of August, 1915.

ROBERT W. JENNINGS,

Judge of the District Court.

EXHIBIT "B."

Know All Men by These Presents:

That the Kake Packing Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Astoria, in Clatsop County, in said state, in consideration of the sum of

Seventy-two Thousand Six Hundred Twenty-one and 01/100 (\$72,621.01) Dollars to it paid by Sanborn Cutting Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Astoria, in Clatsop County, in said state, the receipt whereof is hereby acknowledged, has bargained, sold, transferred and assigned, and by these presents does hereby bargain, sell, transfer, convey and assign unto the said Sanborn Cutting Company, its successors and assigns forever, the entire assets of the said Kake Packing Company, including all stock of merchandise, and including all goods, wares, merchandise and chattels of every kind, nature and description owned by it, or in which it has, or claims to have, any right, title, interest or equity. This includes all lumber, salmon both canned and pickled, nets, web, tins, tin cans, twine, gasoline and cannery supplies, and all cannery buildings, warehouses, bunk houses and dwelling houses, and includes its entire cannery plant situate at or near Kake, in the Territory of Alaska, and includes all machinery, tools, implements and equipment therein contained, or used in or about the conducting of its business there, and also includes all boats, scows, traps and trap sites, and all trap paraphernalia, web, piles, pots, hearts and leads

This conveyance is intended to transfer and convey to the Sanborn Cutting Company, and vest in it, all property of every kind, nature and description owned by the Kake Packing Company, or in which it has any right, title, interest or estate wheresoever situate and

wheresoever located, and the said Kake Packing Company hereby transfers and assigns unto the said Sanborn Cutting Company, its successors and assigns, all right, title, interest and estate which it has of, in or to all property, both real and personal, owned, or claimed to be owned, by it, or in which it has any right, title, interest, estate or equity wheresoever situate, both at Astoria, Oregon, and in Alaska, including bills receivable and choses in action, water rights, conduits and water privileges.

To have and to hold the above described property unto the said Sanborn Cutting Company, its successors and assigns forever.

In Witness whereof, the said Kake Packing Co. has caused these presents to be executed by its President and Secretary and its corporate seal hereunto affixed, this 12th day of May, A. D. 1914, pursuant to a resolution of its stockholders passed at a special meeting called for such purpose, and pursuant to a resolution of its Board of Directors heretofore duly adopted and passed.

KAKE PACKING CO. (Seal)

By Ernest Kirberger,
its President.

KAKE PACKING CO. (Seal)

By Geo. W. Sanborn,
its Secretary.

Executed in the presence of:

G. C. Fulton,
F. P. Kendall.

(Corporate Seal of Kake Packing Company.)

State of Oregon,
County of Clatsop,—ss.

On this twelfth day of May, 1914, before me appeared Ernest Kirberger to me personally known, who being duly sworn did say that he is the President of the Kake Packing Co., and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ernest Kirberger acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal this the day and year first in this my certificate written.

G. C. FULTON,
Notary Public for Oregon.

(Notarial Seal of G. C. Fulton).

United States of America,
Territory of Alaska,
Division Number One,—ss.

V. A. Paine, being first duly sworn on oath, deposes and says that he is the plaintiff in the foregoing action; that he is the Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true as he verily believes.

V. A. PAINE.

Subscribed and sworn to before me this 1st day of December, 1915.

ROYAL A. GUNNISON,

Notary Public in and for the Territory of Alaska.

(Seal)

My commission expires May 10, 1917."

That upon the filing of said complaint, the said plaintiff caused a summons to be issued in due form of law out of said Court, directed to the defendant Kake Packing Company and this defendant, directing and commanding each to answer the said complaint within thirty (30) days of the date of the service of such summons and a copy of said complaint upon them, and if they failed so to appear and answer for want thereof, that plaintiff would apply to the Court for the relief therein demanded. That said summons directed the United States Marshal to cause said summons to be served upon this defendant and said defendant Kake Packing Company, and thereupon, and on or about the day of, 191..., the United States Marshal of Division No. 1 of the District of Alaska caused to be served upon this defendant a copy of said summons and a copy of said complaint, and thereupon this defendant entered its appearance in said suit, and the said suit is now pending in said District Court for the District of Alaska, Division No. 1, and has not been tried or determined.

That the Kake Packing Company named as defendant in such suit is the Kake Packing Company de-

defendant in this suit, and the said Sanborn-Cutting Co. named as defendant in such suit is this answering defendant in this suit, and that the transactions set forth and alleged in said complaint filed in said District Court for the District of Alaska, are the identical transactions set forth in the bill of complaint in this suit; that the said plaintiff in said suit in the said District Court for the District of Alaska is the plaintiff in this suit, and that the issues presented by the complaint in said suit in the District Court for the District of Alaska are identical with the issues presented here, and the relief therein demanded against defendant is identical with the relief herein demanded against it. That a decree rendered and entered in this suit will determine all of the issues presented in the said suit instituted in the District Court for the District of Alaska; and as to this defendant the parties to this suit are identical with the parties to the suit in the said District Court for the District of Alaska, the issues are identical, and the relief demanded identical, and the decree in either case will be decisive as to the other.

This defendant, however, alleges that the said suit brought by the plaintiff in the District Court for the District of Alaska was brought for the purpose of harassing and annoying this defendant, and for the purpose of coercing this defendant into paying plaintiff a large sum of money not due from this defendant to the plaintiff, and not otherwise, and this defendant now finds itself being prosecuted in two Courts upon identically the same subject matter, and the same relief demanded. That this defendant has no business relations whatever

in Alaska; that all the witnesses to the transactions complained of reside in the State of Oregon; and that the transactions complained of all took place and occurred in Oregon, and the alleged cause of suit accrued in Oregon, and if this Court shall permit the plaintiff to prosecute its suit in Alaska, large and heavy expenses will be inflicted upon this defendant in defending such suit. This defendant, therefore, alleges that it is entitled of right to have a temporary injunction issued herein enjoining the said plaintiff from prosecuting said Alaska suit until the final determination of this suit.

All of which matters and things this answering defendant doth aver to be true, and prays judgment of this Honorable Court as follows:

First: That the said plaintiff herein be by a preliminary injunction issued herein enjoined and restrained from prosecuting the said suit instituted by the plaintiff herein in the District Court of the United States for the District of Alaska, Division Number One, at Juneau, wherein plaintiff herein is plaintiff, and the Kake Packing Company, a corporation, and this defendant are defendants, and that upon the final hearing hereon the said injunction be made permanent.

Second: That it be decreed by this Court that the said sale and transfer of the assets of the Kake Packing Company to this defendant was free from fraud and was fairly and honestly made and for a valuable consideration, and that this defendant is now, and ever since May 12, 1914, has been, the owner of the whole thereof, and that the plaintiff herein has neither right, title, interest

or estate therein or thereto, and that the plaintiff be enjoined and restrained from claiming to own any right, title, interest or estate of, in or to the assets of the Kake Packing Company which were on said May 12, 1914, conveyed to this defendant; and

Third: That this defendant have such other and further relief as to this Honorable Court may seem equitable and just, and for its costs and disbursements herein.

G. C. and A. C. FULTON,

Attorneys for Defendant Sanborn-Cutting Co.

State of Oregon,

County of Clatsop—ss.

George W. Sanborn makes solemn oath and says: I am the President of the defendant Sanborn-Cutting Co., and make this verification for and on behalf of said defendant; that so much of the foregoing answer as concerns the acts and things of said defendant Sanborn-Cutting Co. is true, to the best of my own knowledge; and so much thereof as concerns the acts and things of any other corporation, person, or persons, I believe to be true.

GEO. W. SANBORN.

Subscribed and sworn to before me this 7th day of February, A. D. 1916.

G. C. FULTON,

(Seal)

Notary Public for Oregon.

My commission expires Dec. 18, 1919.

State of Oregon,
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in said County and State, this 10th day of February, A. D. 1916.

JAMES J. CROSSLEY,
One of the Attorneys for Plaintiff.

Filed February 11, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of March, 1916, there was duly filed in said Court and cause, a Reply to the Separate Answer of Sanborn-Cutting Company, in words and figures as follows, to wit:

REPLY TO ANSWER OF SANBORN-CUTTING COMPANY.

Comes now the above named plaintiff, V. A. Paine, as Trustee in Bankruptcy of the Kake Trading and Packing Company, bankrupt, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant Sanborn-Cutting Co., herein impleaded as the Sanborn Cutting Company for reply thereunto, or so much thereof as this repliant is advised is material or necessary for him to make reply to, saith:

I.

Replying to the paragraph XI of said answer, plaintiff says he has no knowledge or information sufficient to form a belief and is without knowledge as to whether or not the agreed consideration for said conveyance of its entire assets by the defendant Kake Packing Company to defendant Sanborn-Cutting Co. was \$72,621.01 or \$81,177.18 or any other sum or as to whether or not any sum whatsoever was paid on the claims against the defendant Kake Packing Company, but plaintiff alleges that said Sanborn-Cutting Co. never was and is not a bona fide purchaser of said assets for a valuable consideration and did not pay a valuable or any consideration for said property as against the creditors of said defendant Kake Packing Company and particularly its creditor the said Kake Trading and Packing Company, bankrupt, or its creditors or this plaintiff as its Trustee in bankruptcy.

II.

Replying to paragraph XIII in said answer contained, plaintiff denies that the purchase of the assets of the defendant Kake Packing Company by the defendant Sanborn-Cutting Co. was made in good faith and in ordinary course of business and for a valuable or any consideration whatsoever as against the Kake Trading and Packing Company, bankrupt, or this plaintiff its Trustee in bankruptcy.

III.

Replying to paragraph XV in said answer contained, plaintiff alleges that the defendant Sanborn-Cut-

ting Co. does now and has at all times known and had notice and knowledge of the affairs of the defendant Kake Packing Company, and of the names of the persons who own and control the same.

REPLY TO FIRST AFFIRMATIVE DEFENSE.

And this repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the First Affirmative Defense, for reply thereunto, or so much thereof as this repliant is advised is material or necessary for him to make reply to, saith:

I.

Replying to the first affirmative defense, plaintiff denies the same and each and every allegation therein contained save and except plaintiff admits that he has not offered to repay said defendant Sanborn-Cutting Co. the sum of \$81,177.18, or any other sum.

And plaintiff alleges that on or about January 6, 1914, the defendants Kendall and Sanborn, unlawfully and fraudulently and with the unlawful intent and purpose to defraud and deprive the Kake Trading and Packing Company, bankrupt, and its creditors, of 125 shares of the capital stock of the defendant Kake Packing Company, for which said shares of stock the said Kake Trading and Packing Company, Bankrupt, had theretofore paid \$12,500.00 out of its assets and property and which were owned by it, but which had been issued

and delivered in the name of one Ernest Kirberger, who at said time held the same in trust for said Kake Trading and Packing Company, Bankrupt, and with the unlawful intent and purpose to hinder, delay and defraud the creditors of said Kake Trading and Packing Company, Bankrupt, in the collection of their just and lawful claims and demands against said concern, entered into a conspiracy to obtain said 125 shares of stock from said Ernest Kirberger, in whose name said stock then stood; and plaintiff further alleges that thereupon the said defendants Sanborn and Kendall, in order to carry out said conspiracy, scheme and plan, did coerce and induce said Kirberger, by unlawful threats, duress and undue influence to, and said Kirberger did, assign, transfer and convey to said defendants Kendall and Sanborn said 125 shares of stock in said defendant Kake Packing Company, so owned as aforesaid by said Kake Trading and Packing Company, bankrupt, for the alleged consideration of One (\$1.00) Dollar, which said amount was grossly inadequate, and an insignificant sum to pay, as a consideration for said shares of stock; and plaintiff further says he is informed and believes and therefore charges it to be true that at said time said defendants Sanborn and Kendall and said Kirberger, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently deprive and defraud said Kake Trading and Packing Company, bankrupt, and its creditors thereof, and that at said time said Sanborn, Kendall and Kirberger, and each of them, well

knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says that he is informed and believes and therefore charges it to be true that at said time the said Kake Trading and Packing Company, bankrupt, was insolvent, and that said defendants Kendall and Sanborn and said Kirberger, and each of them, knew, and had reasonable cause to believe, that said Kake Trading and Packing Company was at said time insolvent, and plaintiff further says that he is informed and believes and therefore charges it to be true that the said Kirberger made said assignment without any right, power or authority whatsoever so to do, and that said defendants Kendall and Sanborn had notice and knowledge at the time of the making of said assignment, and prior thereto, that said Kirberger had no right, power or authority whatsoever to make the same, and that neither said Kake Trading and Packing Company nor plaintiff has ever ratified, but on the contrary has disapproved the same; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendants Kendall and Sanborn, or either of them, are not and never were bona fide purchasers for a valuable, or any, consideration of said 125 shares of stock as against the Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankrupt-

true that said defendants Sanborn and Kendall and said Kirberger, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently deprive and defraud said Kake Trading and Packing Company, bankrupt, and its creditors thereof, and that at said time said defendants Sanborn and Kendall, and said Kirberger and said Kake Trading and Packing Company, bankrupt, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendants Kendall and Sanborn, or either of them, are not and never were bona fide purchasers for a valuable, or any, consideration of said claim of indebtedness as against the Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said assignment does now hinder, delay and defraud, and is hindering, delaying and defrauding the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just claims against said bankrupt, and that said assignment is and has been at all times null and void, and ought so to be declared.

and Sanborn to defraud and deprive the Kake Trading and Packing Company, bankrupt, and its creditors, thereof, and with the intent to hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says he is informed and believes and therefore charges it to be true that neither said Kake Trading and Packing Company, bankrupt, nor said Kirberger, nor either of them, had any right, power or authority to so assign said claim of indebtedness, and that said defendants Kendall and Sanborn had notice and knowledge, at the time of the making of said assignment and prior thereto, that neither said Kake Trading and Packing Company, bankrupt, nor said Kirberger, nor either of them, had any right, power or authority to so assign said claim of indebtedness to said defendants or either of them; and that neither said Kake Trading and Packing Company nor this plaintiff has ever ratified the same, but on the contrary have disapproved said assignment; and plaintiff further says that he is informed and believes and therefore charges it to be true that at the time of the making of said assignment of said claim of indebtedness and prior thereto, the said Kake Trading and Packing Company, bankrupt, was insolvent, and that said Kake Trading and Packing Company, said Kirberger, and said defendants Kendall and Sanborn, and each of them, had notice and knowledge and reasonable cause to believe that said Kake Trading and Packing Company was at said time insolvent; and plaintiff further says that he is informed and believes and therefore charges it to be

cy; and plaintiff further alleges that he is informed and believes and therefore charges it to be true that said assignment does now hinder, delay and defraud and is hindering, delaying and defrauding the creditors of the Kake Trading and Packing Company, bankrupt, in the collection of their just claims against said bankrupt, and that said assignment is and has been at all times null and void, and ought so to be declared.

And plaintiff further says that he is informed and believes and therefore charges it to be true that on or about said January 6, 1914, the said defendants Kendall and Sanborn, in pursuance of their said plan and scheme, did coerce and induce said Kirberger, acting for the Kake Trading and Packing Company, bankrupt, by means of unlawful threats, duress and undue influence, to, and said Kake Trading and Packing Company, bankrupt, through said Ernest Kirberger, did, assign to said defendants Kendall and Sanborn a certain claim of indebtedness, amounting to approximately \$8,582.21, which the defendant Kake Packing Company owed to said Kake Trading and Packing Company, bankrupt, on account of certain transactions theretofore occurring between them, for the alleged consideration of One (\$1.00) Dollar, which was a grossly inadequate, and an insignificant sum to pay as a, consideration therefor; and plaintiff saws that he is informed and believes and therefore charges it to be true that said assignment was made by said Kake Trading and Packing Company, bankrupt, through said Kirberger, with the intent and purpose of said Kake Trading and Packing Company, bankrupt, said Kirberger, and said defendants Kendall

And plaintiff further says that he is informed and believes and therefore charges it to be true that thereafter and on or about the 11th day of May, 1914, the defendants Sanborn, Gordon and Kendall caused the said defendant Kake Packing Company to, and said defendant Kake Packing Company did, wrongfully, unlawfully and fraudulently and with the intent to hinder, delay and defraud its creditors, and particularly with intent to hinder, delay and defraud its creditor the said Kake Trading and Packing Company, bankrupt, and the creditors of said Kake Trading and Packing Company, bankrupt, convey its entire assets to the defendant Sanborn-Cutting Co.; and plaintiff further alleges that said conveyance purports to have been made for an alleged consideration of \$72,621.01, but that in truth and in fact the said defendant Sanborn-Cutting Co. is not and never was a bona fide purchaser of said assets for a valuable consideration, and did not pay a valuable, or any, consideration for said assets as against said Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. took said assets with notice and knowledge of said fraudulent intent and purpose of said defendants Kendall, Sanborn and Gordon and Kake Packing Company, and with the intent to assist and aid said defendant Kake Packing Company in hindering, delaying and defrauding its creditors, and particularly its creditor the said Kake Trading and Packing Company, bankrupt, in the collection and payment of their just and lawful

claims and demands against it; and plaintiff further says that he is informed and believes and therefore charges it to be true that at the time of the making of said conveyance, and prior thereto, the said defendants Gordon, Kake Packing Company and Sanborn Cutting Co. had notice and knowledge of the fraudulent assignment of said 125 shares of stock to said defendants Kendall and Sanborn by said Kirberger, and of the fraudulent assignment of said claim of indebtedness of \$8,582.21 by said Kake Trading and Packing Company, bankrupt, through said Kirberger, to said defendants Kendall and Sanborn; and plaintiff further says that he is informed and believes and therefore charges it to be true that at said time of making said conveyance said defendant Kake Packing Company was under the domination and control of said defendant Sanborn-Cutting Co. and that said defendants Kendall and Sanborn were officers, directors and large stockholders in each of said defendant corporations at said time, and that said defendants Kendall, Gordon, Sanborn and Sanborn-Cutting Co. fraudulently and unlawfully caused said conveyance and sale to be made in violation of the duties of said defendants Kendall, Gordon and Sanborn as directors of, and in violation of, and in detriment to the rights of the minority stockholders in said defendant Kake Packing Company, and in detriment and violation of the rights of said Kake Trading and Packing Company, bankrupt, its creditors and this plaintiff as its Trustee in bankruptcy, as a creditor and minority stockholder of said defendant Kake Packing Company; and plaintiff further says that he is informed and believes and there-

fore charges it to be true that said defendant Kake Packing Company did make said conveyance with the intent and purpose aforesaid, and that at said time the defendants Kendall and Sanborn wrongfully and unlawfully controlled and dominated the said 125 shares of stock which was the property of said Kake Trading and Packing Company, bankrupt, and caused the same to be voted as they directed and dictated; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. received and took possession of and still retains possession of said assets with notice and knowledge of all of said facts and with notice and knowledge that the defendant Kake Packing Company did and still does owe just and lawful debts which had not at said time and have not since been paid, but which are still unpaid and owing, and with notice and knowledge that the creditors of said Kake Packing Company, and particularly the said Kake Trading and Packing Company, bankrupt, and its creditors, would be and were hindered, delayed and defrauded by reason of said conveyance; and plaintiff further alleges that he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. is not, and never was, a bona fide purchaser of the assets of said defendant Kake Packing Company for a valuable, or any, consideration, as against the creditors of said Kake Packing Company, and particularly its creditor the said Kake Trading and Packing Company, bankrupt, its creditors, and this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to

be true that said conveyance by said defendant Kake Packing Company of its entire assets to said defendant Sanborn-Cutting Co. did deprive and defraud and is now hindering and defrauding the Kake Trading and Packing Company, bankrupt, and its creditors, as a minority stockholder in said Kake Packing Company, and did hinder, delay and defraud and is now hindering, delaying and defrauding the creditors of said Kake Packing Company, and particularly its creditor the Kake Trading and Packing Company, bankrupt, and its creditors, in the collection of their just and lawful claims against said Kake Packing Company and against said Kake Trading and Packing Company, and that said conveyance is and was at all times null and void, and ought so to be declared and set aside and held for naught as against this plaintiff as such Trustee.

And plaintiff further alleges that thereafter and on the 9th day of April, 1914, the said Kake Trading and Packing Company was duly adjudicated a bankrupt in the United States District Court for the District of Alaska at Juneau, and that thereafter and in due course plaintiff was duly appointed, elected and qualified as a Trustee of said bankrupt; and that the assets in hand of said bankrupt are not sufficient to pay the just and lawful claims of its creditors; and plaintiff further alleges that thereafter he duly recovered judgment for \$10,331.31, together with interest and costs against said defendant Kake Packing Company in the District Court for the District of Alaska and that thereupon he caused an execution to be duly issued out of said court directed to the United States Marshal for the First Division of

Alaska, in which division and territory said Kake Packing Company conducted its business and in which said division and territory are located practically all the assets conveyed by said Kake Packing Company to said defendant Sanborn Packing Company; and that said execution was thereafter duly returned by said United States Marshal endorsed "No property found."

And plaintiff alleges that by reason of said facts the said defendant Sanborn-Cutting Co. is and ought to be estopped from contending, claiming, alleging or pleading that this plaintiff should pay or tender to said defendant the sum of \$81,177.18, or any sum whatsoever; from contending, claiming, alleging or pleading the said assignment of 125 shares of stock, and from contending, claiming, alleging or pleading the said assignment of said claim of \$8,582.21; and that plaintiff is entitled to and should recover from the defendant Sanborn-Cutting Co. the sum of \$12,500.00, the value of said 125 shares of stock, and the further sum of \$10,333.31, together with interest and costs in said suit brought in said District Court for Alaska against said Kake Packing Company, aggregating \$10,833.31, together with interest thereon from August 27, 1915.

REPLY TO SECOND AFFIRMATIVE DEFENSE.

And this repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the Second Affirmative Defense, for

reply thereunto, or so much thereof as this repliant is advised is material or necessary for him to make reply to, saith:

I.

Replying to paragraph one of said Second Affirmative Defense plaintiff denies each and every allegation therein contained except plaintiff admits that on or about the 12th day of May, 1914, the defendant Kake Packing Company conveyed all of its assets to the defendant Sanborn-Cutting Co.; and plaintiff alleges that at the time of the making of said conveyance and long prior thereto the said defendant Sanborn-Cutting Co. was acquainted with and knew all the affairs of the defendant Kake Packing Company and that at said time the defendants Kendall and Sanborn were officers and directors and large stockholders in both of said corporations.

And plaintiff alleges that on or about January 6, 1914, the defendants Kendall and Sanborn, unlawfully and fraudulently and with the unlawful intent and purpose to defraud and deprive the Kake Trading and Packing Company, bankrupt, and its creditors, of 125 shares of the capital stock of the defendant Kake Packing Company, for which said shares of stock the said Kake Trading and Packing Company, bankrupt, had theretofore paid \$12,500.00 out of its assets and property and which were owned by it, but which had been issued and delivered in the name of one Ernest Kirberger, who at said time held the same in trust for said Kake Trading and Packing Company, bankrupt, and with the unlawful intent and purpose to hinder, delay and defraud the cred-

itors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said concern, entered into a conspiracy to obtain said 125 shares of stock from said Ernest Kirberger in whose name said stock then stood; and plaintiff further alleges that thereupon the said defendants Sanborn and Kendall, in order to carry out said conspiracy, scheme and plan, did coerce and induce said Kirberger, by unlawful threats, duress and undue influence, to, and said Kirberger did, assign, transfer and convey to said defendants Kendall and Sanborn said 125 shares of stock in said defendant Kake Packing Company, so owned as aforesaid by Kake Trading and Packing Company, bankrupt, for the alleged consideration of One (\$1.00) Dollar, which said amount was grossly inadequate, and an insignificant sum to pay, as a consideration for said shares of stock; and plaintiff further says he is informed and believes and therefore charges it to be true that at said time said defendants Sanborn and Kendall and said Kirberger, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently deprive and defraud said Kake Trading and Packing Company, bankrupt, and its creditors thereof, and that at said time said Sanborn, Kendall and Kirberger, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently hinder, de-

lay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says that he is informed and believes and therefore charges it to be true that at said time the said Kake Trading and Packing Company, bankrupt, was insolvent, and that said defendants Kendall and Sanborn and said Kirberger, and each of them, knew, and had reasonable cause to believe, that said Kake Trading and Packing Company was at said time insolvent; and plaintiff further says that he is informed and believes and therefore charges it to be true the said Kirberger made said assignment without any right, power or authority whatsoever so to do, and that said defendants Kendall and Sanborn had notice and knowledge at the time of the making of said assignment, and prior thereto, that said Kirberger had no right, power or authority whatsoever to make the same; and plaintiff says he is informed and believes and therefore charges it to be true that said defendants Kendall and Sanborn, or either of them, are not and never were bona fide purchasers for a valuable, or any consideration of said 125 shares of stock as against the Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further alleges that he is informed and believes and therefore charges it to be true that said assignment does now hinder, delay and defraud, and is hindering, delaying and defrauding the creditors of the Kake Trading and Packing Company, bankrupt, in the collection of their just claims against said bankrupt, and that said assignment

is and has been at all times null and void, and ought so to be declared.

And plaintiff admits and alleges that he is informed and believes and therefore charges it to be true that on or about January 6, 1914, the said defendants Kendall and Sanborn, in pursuance of their said plan and scheme, did coerce and induce said Kirberger acting for the Kake Trading and Packing Company, bankrupt, by means of unlawful threats, duress and undue influence, to, and said Kake Trading and Packing Company, bankrupt, through said Ernest Kirberger, did, assign to said defendants Kendall and Sanborn a certain claim of indebtedness, amounting to approximately \$8,582.21, which the defendant Kake Packing Company owed to said Kake Trading and Packing Company, bankrupt, on account of certain transactions theretofore occurring between them, for the alleged consideration of One (\$1.00) Dollar, which was a grossly inadequate, and an insignificant sum to pay as a consideration therefor; and plaintiff says that he is informed and believes and therefore charges it to be true that said assignment was made by said Kake Trading and Packing Company, bankrupt, through said Kirberger, with the intent and purpose of said Kake Trading and Packing Company, bankrupt, said Kirberger, and said defendants Kendall and Sanborn to defraud and deprive the Kake Trading and Packing Company, bankrupt, and its creditors, thereof, and with the intent to hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff

further says he is informed and believes and therefore charges it to be true that neither said Kake Trading and Packing Company, bankrupt, nor said Kirberger, nor either of them, had any right, power or authority to so assign said claim of indebtedness, and that said defendants Kendall and Sanborn had notice and knowledge, at the time of the making of said assignment and prior thereto, that neither said Kake Trading and Packing Company, bankrupt, nor said Kirberger, nor either of them, had any right, power or authority to so assign said claim of indebtedness to said defendants, or to either of them; and plaintiff further says that he is informed and believes and therefore charges it to be true that at the time of the making of said assignment of said claim of indebtedness and prior thereto the said Kake Trading and Packing Company, bankrupt, was insolvent, and that said Kake Trading and Packing Company, said Kirberger, and said defendants Kendall and Sanborn, and each of them, had notice and knowledge and reasonable cause to believe that said Kake Trading and Packing Company was at said time insolvent; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendants Sanborn and Kendall and said Kirberger, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently deprive and defraud said Kake Trading and Packing Company, bankrupt, and its creditors thereof, and that at said time said defendants Sanborn and Kendall, and said Kirberger

and said Kake Trading and Packing Company, bankrupt, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendants Kendall and Sanborn, or either of them, are not and never were bona fide purchasers for a valuable, or any, consideration of said claim of indebtedness as against the Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said assignment does now hinder, delay and defraud and is hindering, delaying and defrauding the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just claims against said bankrupt, and that said assignment is and has been at all times null and void, and ought so to be declared.

And plaintiff admits that said defendant Kake Packing Company executed and delivered to defendant Sanborn-Cutting Co. a deed of conveyance whereby it conveyed its entire said assets to said defendant, Sanborn-Cutting Co., but plaintiff denies that said conveyance is a good and sufficient conveyance, and alleges that on the contrary the same is invalid and is and ought to be

declared null and void, and that the same was made without the consent of the Kake Trading and Packing Company, bankrupt, and in fraud of its rights as a minority stockholder of said Kake Packing Company; and was made with the intent to hinder, delay and defraud the creditors of said Kake Packing Company and particularly its creditor the Kake Trading and Packing Company.

And plaintiff further says that he is informed and believes and therefore charges it to be true that on or about the 11th day of May, 1914, the defendants Sanborn, Gordon and Kendall caused the said defendant Kake Packing Company to, and said defendant Kake Packing Company did, wrongfully, unlawfully and fraudulently and with the intent to hinder, delay and defraud its creditors, and particularly with intent to hinder, delay and defraud its creditor the said Kake Trading and Packing Company, bankrupt, and the creditors of said Kake Trading and Packing Company, bankrupt, convey its entire assets to the defendant Sanborn-Cutting Co.; and plaintiff further alleges that said conveyance purports to have been made for an alleged consideration of \$72,621.01, but that in truth and in fact the said defendant Sanborn-Cutting Co. is not and never was a bona fide purchaser of said assets for a valuable consideration, and did not pay a valuable, or any, consideration for said assets as against said Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. took said

assets with notice and knowledge of said fraudulent intent and purpose of said defendants Kendall, Sanborn, Gordon, and Kake Packing Company, and with the intent to assist and aid said defendant Kake Packing Company in hindering, delaying and defrauding its creditors, and particularly its creditor the said Kake Trading and Packing Company, bankrupt, in the collection and payment of their just and lawful claims and demands against it; and plaintiff further says that he is informed and believes and therefore charges to be true at the time of the making of said conveyance, and prior thereto, the said defendants Gordon, Kake Packing Company and Sanborn-Cutting Co. had notice and knowledge of the fraudulent assignment of said 125 shares of stock to said defendants Kendall and Sanborn by said Kirberger, and of the fraudulent assignment of said claim of indebtedness of \$8,582.21 by said Kake Trading and Packing Company, bankrupt, through said Kirberger, to said defendants Kendall and Sanborn.

And plaintiff further says that he is informed and believes and therefore charges it to be true that at said time of making said conveyance said defendant Kake Packing Company was under the domination and control of said defendant Sanborn-Cutting Co., and that said defendants Kendall and Sanborn were officers, directors and large stockholders in each of said defendant corporations at said time, and that said defendants Kendall, Gordon, Sanborn and Sanborn-Cutting Co. fraudulently and unlawfully caused said conveyance and sale to be made in violation of the duties of said defendants Gordon, Kendall and Sanborn as directors of, and in vio-

lation of, and in detriment to the rights of the minority stockholders in, said defendant Kake Packing Company, and in detriment and violation of the rights of said Kake Trading and Packing Company, bankrupt, its creditors and this plaintiff as its Trustee in bankruptcy, as a creditor and minority stockholder of said defendant Kake Packing Company; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendant Kake Packing Company did make said conveyance with the intent and purpose aforesaid, and that at said time the said defendants Kendall and Sanborn wrongfully and unlawfully controlled and dominated the said 125 shares of stock which was the property of said Kake Trading and Packing Company, bankrupt, and caused the same to be voted as they directed and dictated; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. received and took possession and still retains possession of said assets with notice and knowledge of all of said facts and with notice and knowledge that the defendant Kake Packing Company did and still does owe just and lawful debts which had not at said time and have not since been paid, but which are still unpaid and owing, and with notice and knowledge that the creditors of said Kake Packing Company, and particularly the said Kake Trading and Packing Company, bankrupt, and its creditors, would be and were hindered, delayed and defrauded by reason of said conveyance; and plaintiff further alleges that he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. is

not and never was a bona fide purchaser of the assets of said defendant Kake Packing Company for a valuable, or any, consideration, as against the creditors of said Kake Packing Company, and particularly its creditor the said Kake Trading and Packing Company, bankrupt, its creditors, and this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said conveyance by said defendant Kake Packing Company of its entire assets to said defendant Sanborn-Cutting Co. did deprive and defraud and is now hindering and defrauding the Kake Trading and Packing Company, bankrupt, and its creditors, as a minority stockholder in said Kake Packing Company, and did hinder, delay and defraud and is now hindering, delaying and defrauding the creditors of said Kake Packing Company, and particularly its creditor the Kake Trading and Packing Company, bankrupt, and its creditors, in the collection of their just and lawful claims against said Kake Packing Company and against said Kake Trading and Packing Company, and that said conveyance is and was at all times null and void, and ought so to be declared and set aside and held for naught as against this plaintiff as such Trustee.

And plaintiff further denies that the sale of said property and the execution and sale of said conveyance was duly authorized by the stockholders and by the Board of Directors of said corporation. Plaintiff further says that he has no knowledge and information sufficient to form a belief as to whether or not upon the delivery of said deed of conveyance, or any time, the said

Kake Packing Company, through its officers or in any wise delivered to the defendant Sanborn-Cutting Co. a statement which was represented to said defendant, or to anyone, to contain the names of all the creditors of said Kake Packing Company and the true amount due each creditor, or any statement whatsoever, and that the defendant Sanborn-Cutting Co. agreed to pay said claims in full, and in accordance therewith did pay and satisfy each and all of said claims in full or any of them, and therefore denies each and every of said allegations, and plaintiff further says that he has no knowledge or information sufficient to form belief and is without knowledge as to whether or not the Kake Packing Company, through its officers, or in any wise, furnished to said defendant Sanborn-Cutting Co. a statement showing its indebtedness to be \$72,621.01, or any amount whatsoever, and that said statement was incorrect; and plaintiff denies that \$81,117.18 was the true consideration which the defendant Sanborn-Cutting Co. paid for the sale and transfer to it of all the assets of the Kake Packing Company, but on the contrary alleges that there was no consideration whatsoever for said conveyance as against this plaintiff as Trustee, and the Kake Trading and Packing Company, bankrupt, and to its creditors. Plaintiff admits that the sale of the entire assets of the Kake Packing Company to the defendant Sanborn-Cutting Co. was made on or about May 12, 1914, and that the Kake Trading and Packing Company was adjudicated a bankrupt in the United States District Court at Juneau, Alaska, on the 9th day of April, 1915.

Plaintiff denies that the defendants Sanborn-Cutting Co. purchased the entire assets of Kake Trading and Packing Company as a bona fide purchaser and without any notice or knowledge or any business transactions occurring between said Ernest Kirberger and said Kake Trading and Packing Company, bankrupt, and plaintiff further denies that the defendant Sanborn-Cutting Company before the making of said purchase was fully advised as to the authorization of such sale, both by the stockholders of such corporation and the directors thereof; and plaintiff alleges that said sale has in no wise been authorized, ratified or acquiesced in by the Kake Trading or Packing Company, or by its stockholders or Board of Directors, or by this plaintiff as its Trustee in bankruptcy, but on the contrary plaintiff alleges the same has been expressly disapproved and discountenanced by them.

Plaintiff says that he has no knowledge or information sufficient to form a belief and is without knowledge as to whether or not Ernest Kirberger was present at a meeting of the stockholders of said Kake Packing Company, authorizing such sale, and voted the 125 shares of stock hereinbefore referred to, or any portion thereof, or that said Ernest Kirberger was present at any meeting of the Directors of said corporation authorizing such sale, and voted in favor of such sale; but plaintiff alleges that at all times after January 6, 1914, said 125 shares of stock was dominated and controlled and voted in accordance with the wishes and dictates of the defendants Kendall and Sanborn at any and all meetings of either

the Board of Directors or of the stockholders of said corporation held after said date.

Plaintiff denies that he, as Trustee of the Kake Trading and Packing Company, and the said Kake Trading and Packing Company, bankrupt, ought to be and are estopped from in any wise contending, alleging or pleading that the sale of the entire assets of the Kake Packing Company was fraudulent and void, or from contending, alleging and pleading in any manner that the same should be set aside; but on the contrary plaintiff alleges that neither said plaintiff, as Trustee, nor the said Kake Packing Company, nor either of them, have in any wise ratified or acquiesced in said sale and that said sale was and is in fraud of the rights of the Kake Trading and Packing Company, bankrupt, as a minority stockholder in and as a creditor of said Kake Packing Company and was made with intent to hinder, delay and defraud the creditors of the Kake Packing Company and particularly its creditor the said Kake Trading and Packing Company, bankrupt, and its creditors, and was made with the intent to hinder, delay and defraud, and has at all times hindered, delayed and defrauded the creditors of said Kake Trading and Packing Company, bankrupt, and is null and void, and that said defendant Sanborn-Cutting Co. had notice and knowledge of all of said facts at the time of and long prior to the making of said sale and took the property subject to the claims of the creditors of said Kake Packing Company and of its creditor the Kake Trading and Packing Company, bankrupt, and the creditors of said bankrupt; and plaintiff alleges that on August 27, 1915, he duly recovered

judgment against the Kake Packing Company in the District Court for the District of Alaska in the sum of \$10,333.31, together with interest and costs, aggregating the sum of \$10,833.31, and that thereafter he duly caused an execution to be issued out of said court in said cause, directed to the United States Marshal for the First Division of Alaska, in which division and district are and were located practically all of said assets conveyed by said Kake Packing Company to said defendant Sanborn-Cutting Co., and that thereafter said Marshal duly returned said execution, duly endorsed "No property found"; and plaintiff denies each and every other allegation in said paragraph one of said Second Affirmative Defense.

II.

Replying to paragraph two of said Second Affirmative Defense, plaintiff denies each and every allegation therein contained, save and except plaintiff admits that the defendant Sanborn-Cutting Co. immediately upon the delivery of said deed of conveyance of date May 12, 1914, to it, entered into possession of all of said assets so conveyed to it by said Kake Packing Company, and has at all times since and does now retain the possession thereof, and that it has at all times since and does now conduct and operate said business and that it has made large and remunerative profits therefrom; and plaintiff denies each and all and every other allegation in said paragraph II of said Second Affirmative Defense contained.

REPLY TO THIRD AFFIRMATIVE DEFENSE.

And this repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertanities and insufficiencies of the Third Affirmative Defense, for reply thereunto, or so much thereof as this repliant is advised is material or necessary for him to make reply to, saith:

I.

Replying to paragraph I of said Third Affirmative Defense plaintiff admits all the allegations thereof, save and except that plaintiff denies that said defendant Sanborn-Cutting Co. was licensed to engage in business in Alaska at any time prior to the 29th day of December, 1915.

II.

Replying to paragraph II in said Third Affirmative Defense contained, plaintiff admits that on the 6th day of December, 1915, he instituted that certain suit in the District Court for the District of Alaska, at Juneau, entitled 1405-A, V. A. Paine as Trustee in bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt, plaintiff, vs. Kake Packing Company, a corporation, and the Sanborn-Cutting Company, a corporation, defendants, and that the bill of complaint in said suit is substantially as alleged in said paragraph two of said defense.

And plaintiff admits that he caused a summons to duly issue out of said District Court for Alaska, which summons was thereafter duly served on each of the said defendants in said suit, and that said defendant Sanborn-Cutting Co. has now entered its appearance in said suit and that said defendant Kake Packing Company has now appeared therein, and that said suit is now pending in said court and has not been determined; and plaintiff admits that the defendants Kake Packing Company and Sanborn-Cutting Company in said suit in the District Court for Alaska are the defendants Kake Packing Company and Sanborn-Cutting Co. named in this suit.

And plaintiff denies each and every other allegation contained in said paragraph II of said defense, and alleges that said suit so brought in the District Court for Alaska was brought by plaintiff as Trustee in bankruptcy for the Kake Trading and Packing Company, which said corporation on April 9, 1915, was duly adjudicated a bankrupt by the United States District Court for the District of Alaska, Division No. One, at Juneau, and of which court this plaintiff as such trustee is an officer; and plaintiff further alleges that said suit is a suit in equity instituted by him as such Trustee seeking relief from certain fraudulent transactions hereinafter referred to, whereby the creditors of said bankrupt corporation have been and are now being hindered, delayed and defrauded in the collection of their just claims against said bankrupt. And plaintiff alleges that on or about January 6, 1914, the defendants Kendall and Sanborn, unlawfully and fraudulently and with the unlawful intent and purpose to defraud and deprive the Kake Trading

and Packing Company, bankrupt, and its creditors, of 125 shares of the capital stock of the Kake Packing Company, for which said shares of stock the said Kake Trading and Packing Company, bankrupt, had theretofore paid \$12,500.00 out of its assets and property and which were owned by it, but which had been issued and delivered in the name of one Ernest Kirberger, who at said time held the same in trust for said Kake Trading and Packing Company, bankrupt, and with the unlawful intent and purpose to hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said concern, entered into a conspiracy to obtain said 125 shares of stock from said Ernest Kirberger, in whose name said stock then stood; and plaintiff further alleges that thereupon the said defendants Sanborn and Kendall, in order to carry out said conspiracy, scheme and plan, did coerce and induce said Kirberger, by unlawful threats, duress and undue influence, to, and said Kirberger did, assign, transfer and convey to said defendants Kendall and Sanborn said 125 shares of stock in said defendant Kake Packing Company, so owned as aforesaid by said Kake Trading and Packing Company, bankrupt, for the alleged consideration of One (\$1.00) Dollar, which said amount was grossly inadequate, and an insignificant sum to pay, as a consideration for said shares of stock; and plaintiff further says he is informed and believes and therefore charges it to be true that at said time said defendants Sanborn and Kendall and said Kirberger, and each of them, well knew and had notice and knowl-

edge of the fact, and reasonable cause to believe that said assignment would, and that they did make and receive said assignment with the intent to unlawfully and fraudulently deprive and defraud said Kake Trading and Packing Company, bankrupt, and its creditors thereof, and that at said time said Sanborn, Kendall and Kirberger, and each of them, well knew and had notice and knowledge of the fact, and reasonable cause to believe, that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says that he is informed and believes and therefore charges it to be true that at said time the said Kake Trading and Packing Company, bankrupt, was insolvent, and that said defendants Kendall and Sanborn and said Kirberger, and each of them, knew and had reasonable cause to believe that said Kake Trading and Packing Company was at said time insolvent; and plaintiff further says that he is informed and believes and therefore charges it to be true that said Kirberger made said assignment without any right, power or authority whatsoever so to do, and that said defendants Kendall and Sanborn had notice and knowledge at the time of the making thereof, and prior thereto, that said Kirberger had no right, power or authority whatsoever to make the same; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendants Kendall and Sanborn, or either of

them, are not and never were bona fide purchasers for a valuable, or any, consideration of said 125 shares of stock as against the Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further alleges that he is informed and believes and therefore charges it to be true that said assignment does now hinder, delay and defraud and is hindering, delaying and defrauding the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just claims against said bankrupt, and that said assignment is and has been at all times null and void, and ought so to be declared.

And plaintiff further says that he is informed and believes and therefore charges it to be true that on or about said January 6, 1914, the said defendants Kendall and Sanborn, in pursuance of their said plan and scheme, did coerce and induce said Kirberger acting for the Kake Trading and Packing Company, bankrupt, by means of unlawful threats, duress and undue influence, to, and said Kake Trading and Packing Company, bankrupt, through said Ernest Kirberger, did, assign to said defendants Kendall and Sanborn a certain claim of indebtedness, amounting to approximately \$8,582.21, which the defendant Kake Packing Company owed to said Kake Trading and Packing Company, bankrupt, on account of certain transactions theretofore occurring between them, for the alleged consideration of One (\$1.00) Dollar, which was grossly inadequate, and an insignificant sum to pay as a, consideration therefore; and plaintiff says that he is informed and believes and therefore charges it to be true that said assignment was made by

said Kake Trading and Packing Company, bankrupt, through said Kirberger, with the intent and purpose of said Kake Trading and Packing Company, bankrupt, said Kirberger, and said defendants Kendall and Sanborn to defraud and deprive the Kake Trading and Packing Company, bankrupt, and its creditors, thereof, and with the intent to hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says he is informed and believes and therefore charges it to be true that neither said Kake Trading and Packing Company, bankrupt, nor said Kirberger, nor either of them, had any right, power or authority to so assign said claim of indebtedness and that said defendants Kendall and Sanborn had notice and knowledge, at the time of the making of said assignment and prior thereto, that neither said Kake Trading and Packing Company, bankrupt, nor said Kirberger, nor either of them, had any right, power or authority to so assign said claim of indebtedness to said defendants or to either of them; and that neither said Kake Trading and Packing Company, nor this plaintiff has ever ratified the same, but on the contrary have disratified and disapproved said assignment; and plaintiff further says that he is informed and believes and therefore charges it to be true at the time of the making of said assignment of said claim of indebtedness and prior thereto the said Kake Trading and Packing Company, bankrupt, was insolvent, and that said Kake Trading and Packing Company, said Kirberger, and said defendants Kendall and Sanborn,

and each of them, had notice and knowledge and reasonable cause to believe that said Kake Trading and Packing Company was at said time insolvent; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendants Sanborn and Kendall and said Kirberger, and each of them, well knew and had notice and knowledge of the fact and reasonable cause to believe that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently deprive and defraud said Kake Trading and Packing Company, bankrupt, and its creditors thereof, and that at said time said defendants Sanborn and Kendall, and said Kirberger, and said Kake Trading and Packing Company, bankrupt, and each of them, well knew and had notice and knowledge of the fact and reasonable cause to believe that said assignment would, and that they did make and receive said assignment with the intent to, unlawfully and fraudulently hinder, delay and defraud the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just and lawful claims and demands against said bankrupt; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendants Kendall and Sanborn, or either of them, are not and never were bona fide purchasers for a valuable, or any, consideration of said claim of indebtedness as against the Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said assignment does

now hinder, delay and defraud and is hindering, delaying and defrauding the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just claims against said bankrupt, and that said assignment is and has been at all times null and void, and ought so to be declared.

And plaintiff further says that he is informed and believes and therefore charges it to be true that thereafter and on or about the 11th day of May, 1914, the defendants Sanborn, Gordon and Kendall caused the said defendants Kake Packing Company to, and said defendant Kake Packing Company did, wrongfully, unlawfully and fraudulently and with the intent to hinder, delay and defraud its creditors, and particularly with intent to hinder, delay and defraud its creditor the said Kake Trading and Packing Company, bankrupt, and the creditors of said Kake Trading and Packing Company, bankrupt, convey its entire assets to the defendant Sanborn-Cutting Co.; and plaintiff further alleges that said conveyance purports to have been made for an alleged consideration of \$72,621.01, but that in truth and in fact the said defendant Sanborn-Cutting Co. is not and never was a bona fide purchaser of said assets for a valuable consideration, and did not pay a valuable, or any, consideration for said assets as against said Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. took said assets with notice and knowledge of said fraudulent intent and purpose of said defendants

Kendall, Sanborn, Gordon and Kake Packing Company, and with the intent to assist and aid said defendant Kake Packing Company in hindering, delaying and defrauding its creditors, and particularly its creditor the said Kake Trading and Packing Company, bankrupt, in the collection and payment of their just and lawful claims and demands against it; and plaintiff further says that he is informed and believes and therefore charges it to be true that at the time of the making of said conveyance, and prior thereto, the said defendants Gordon, Kake Packing Company and Sanborn-Cutting Co. had notice and knowledge of the fraudulent assignment of said 125 shares of stock to said defendants Kendall and Sanborn by said Kirberger, and of the fraudulent assignment of said claim of indebtedness of \$8,582.21 by said Kake Trading and Packing Company, bankrupt, through said Kirberger, to said defendants Kendall and Sanborn; and plaintiff further says that he is informed and believes and therefore charges it to be true that at said time of making said conveyance said defendant Kake Packing Company was under the domination and control of said defendant Sanborn - Cutting Co., and that said defendants Kendall and Sanborn were officers, directors and large stockholders in each of said defendant corporations at said time, and that said defendants Kendall, Gordon, Sanborn and Sanborn-Cutting Co. fraudulently and unlawfully caused said conveyance and sale to be made in violation of the duties of said defendants Gordon, Kendall and Sanborn as directors of, and in violation of and in detriment to the rights of the minor-

ity stockholders in said defendant Kake Packing Company, and in detriment and violation of the rights of said Kake Trading and Packing Company, bankrupt, its creditors and this plaintiff as its Trustee in Bankruptcy, as a creditor and minority stockholder of said defendant Kake Packing Company; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendant Kake Packing Company did make said conveyance with the intent and purpose aforesaid, and that at said time the said defendants Kendall and Sanborn wrongfully and unlawfully controlled and dominated the said 125 shares of stock which was the property of said Kake Trading and Packing Company, bankrupt, and caused the same to be voted as they directed and dictated; and plaintiff further says that he is informed and believes and therefore charges it to be true that said defendant Sanborn-Cutting Co. received and took possession and still retains possession of said assets with notice and knowledge of all of said facts and with notice and knowledge that the defendant Kake Packing Company did and still does owe just and lawful debts which had not at said time and have not since been paid but which are still unpaid and owing, and with notice and knowledge that the creditors of said Kake Packing Company, and particularly its creditor the said Kake Trading and Packing Company, bankrupt, and its creditors, would be and were hindered, delayed and defrauded by reason of said conveyance; and plaintiff further alleges that he is informed and believes and therefore charges it to be true that said defendant Sanborn - Cutting Co.

is not and never was a bona fide purchaser of the assets of said defendant Kake Packing Company for a valuable, or any, consideration as against the creditors of said Kake Packing Company, and particularly its creditor the said Kake Trading and Packing Company, bankrupt, its creditors, and this plaintiff as its Trustee in Bankruptcy; and plaintiff further says he is informed and believes and therefore charges it to be true that said conveyance by said defendant Kake Packing Company of its entire assets to said defendant Sanborn-Cutting Co. did deprive and defraud and its now hindering and defrauding the Kake Trading and Packing Company, bankrupt, and its creditors as a minority stockholder in said Kake Packing Company, and did hinder, delay and defraud and is now hindering, delaying and defrauding the creditors of said Kake Packing Company, and particularly its creditor the Kake Trading and Packing Company, bankrupt, and its creditors, in the collection of their just and lawful claims against said Kake Packing Company and against said Kake Trading and Packing Company, and that said conveyance is and was at all times null and void, and ought so to be declared and set aside and held for naught as against this plaintiff as such Trustee.

And plaintiff alleges that thereafter and on the 9th day of April, 1915, the Kake Trading and Packing Company was duly adjudicated a bankrupt in the United States District Court for the District of Alaska at Juneau, and thereafter and in due course plaintiff was duly appointed, elected and qualified as Trustee in Bankruptcy of said Kake Trading and Packing Com-

pany, bankrupt, and at all times since has been and is now the duly appointed, elected, qualified and acting Trustee in Bankruptcy of the said corporation, bankrupt; and plaintiff further alleges that upon the appointment and qualification of plaintiff as such Trustee he became the owner of all the property and assets of said Kake Trading and Packing Company, bankrupt, and that the title thereto vested in him; and plaintiff further alleges that thereupon said claim of indebtedness of \$8,582.21, hereinbefore referred to, did become the property of, and the title thereto vested in and at all times since has been and is now vested in and the property of this plaintiff as such Trustee; and plaintiff further alleges that the assets in hand of said bankrupt are not sufficient to pay the just and lawful claims of its creditors; and plaintiff further avers as hereinbefore stated that he thereupon instituted against the Kake Packing Company a suit in the District Court for the District of Alaska, at Juneau, of which said court he is an officer as such Trustee, to recover the sum of \$10,333.31, together with interest at 8% per annum from January 31, 1915, which said sum said Kake Packing Company did at said time and does now owe plaintiff as such Trustee in Bankruptcy of said Kake Trading and Packing Company, bankrupt; and plaintiff further alleges that thereafter and on the 27th day of August, 1915, he duly recovered judgment against said Kake Packing Company in said suit for said sum of \$10,333.31, together with said interest and his costs in said suit, which said judgment is the identical judgment set up in the third affirmative defense of defendant's answer herein, and is in words and figures as follows:

*"In the District Court for the District of Alaska,
Division Number One, at Juneau.*

V. A. Paine, as Trustee of Estate of Kake
Trading and Packing Company a Corpora-
tion, Bankrupt,

Plaintiff,

vs.

Kake Packing Company, a Corporation,
Defendant.

No. 1328-A. JUDGMENT.

Now on this day this matter coming on for hearing upon the motion of the plaintiff for judgment to be entered herein, said plaintiff appearing by his attorneys, Messrs. Gunnison and Robertson, and defendant appearing not; and it appearing to the Court that heretofore, to-wit, on July 10, 1915, complaint was filed herein, and that thereafter and on said day summons was duly issued commanding said defendant to be and appear in this Court at Juneau, within thirty days from the date of the service of said summons and a copy of said complaint upon it; and it further appearing that thereafter, and on July 13, 1915, said summons, together with a copy of said complaint, was duly served upon said defendant, and it further appearing that thereafter and on the 23d day of August, 1915, on application of said plaintiff, the said defendant having in no wise appeared herein and more than thirty days having expired since the service of the said summons upon it, the Clerk of this Court duly entered the default of said

defendant; and said defendant now in no wise having appeared and answered plaintiff's complaint is in default, and the court being now fully advised in the premises;

Now, therefore, it is ordered and adjudged that the said plaintiff do have and recover judgment against said defendant for the sum of Ten Thousand Three Hundred Thirty-three Dollars and Thirty-one Cents (\$10,333.31), with interest at the rate of Eight per centum per annum from the 31st day of January, 1915, and for his costs and disbursements herein incurred, taxed at the sum of Seventeen and 60/100 (\$17.60) Dollars.

Let execution issue in accordance herewith.

Done in open court this the 27th day of August, 1915.

ROBERT W. JENNINGS,
Judge of the District Court."

And plaintiff further alleges that thereafter he caused an execution to be duly issued in said action out of said Court and placed in the hands of the United States Marshal for the First Division of Alaska, in which said Division and District were and are located practically all the assets which were conveyed by said defendant Kake Packing Company in said conveyance made by it on or about May 12, 1914, to said defendant Sanborn - Cutting Co. and that said execution has been duly returned by said Marshal, endorsed "No property found," and plaintiff alleges that thereafter he

instituted said suit in equity No. 1405-Å, against the defendants Kake Packing Company and Sanborn-Cutting Co., which is the identical suit set up in the third affirmative defense of defendant's answer herein, requesting a decree and judgment against the Sanborn-Cutting Co. for the amount of indebtedness owing to plaintiff as such Trustee; and plaintiff further alleges that the defendant Sanborn - Cutting Co. is and ought to be estopped and not permitted to in any wise contend, allege or plead the said assignment of said indebtedness by the said Kake Trading and Packing Company, through said Kirberger, to said defendants Kendall and Sanborn, or to either of them, or to contend, allege or plead the conveyance of the entire assets of the Kake Packing Company by it to said defendant Sanborn - Cutting Co. for the reason that said assignment of said indebtedness to said defendants Sanborn and Kendall is and was and at all times has been null and void, and that there was no consideration whatsoever therefor as against the Kake Trading and Packing Company, bankrupt, its creditors, or this plaintiff as its Trustee in Bankruptcy; and that said assignment was made with the intent to hinder, delay and defraud the creditors of said Kake Trading and Packing Company, and has at all times and is now hindering and delaying the creditors of said Kake Trading and Packing Company, bankrupt, in the collection of their just claims against said bankrupt, and that neither said Kake Trading and Packing Company nor said Kirberger, or either of them, had any right, power or authority to make said assignment; and that the said

defendant Sanborn - Cutting Co. accepted and took and now retains possession of the entire assets of said Kake Packing Company under said conveyance of May 12, 1914, with full notice and knowledge of all of said facts.

And defendant denies that the defendant Sanborn-Cutting Co. is entitled to have a temporary injunction issued herein enjoining the plaintiff from prosecuting the said suit in equity in the District Court of Alaska until the final determination of this suit or at all, but on the contrary plaintiff alleges that he is entitled of right to have the defendant Sanborn-Cutting Co. permanently restrained and enjoined from in any wise obtaining from the defendants Kendall and Sanborn, or either of them, said assignment of said indebtedness and to have the defendants Kendall and Sanborn and each of them permanently restrained from disposing of or transferring said assignment to the defendants Sanborn-Cutting Co. and Kake Packing Company, or either of them, or at all; and that plaintiff is further entitled to a decree and judgment against said Sanborn-Cutting Co. for the sum of \$10,333.13, which is the amount of said judgment recovered by plaintiff against said Kake Packing Company in said suit in the District Court for Alaska, together with interest and his costs in said suit, aggregating \$10,833.13, together with interest thereon from the 27th day of August, 1915; and that plaintiff is further entitled to have said assignment made by said Kake Trading and Packing Company, through said Kirberger, to said defendants Kendall and Sanborn, declared null and void.

And plaintiff further alleges that he, plaintiff, did not set up in his bill of complaint herein the said assignment by said Kake Trading and Packing Company, bankrupt, through said Kirberger, to said defendants Kendall and Sanborn, for the reason that he was advised and believed that said transaction was a separate transaction from the assignment of said 125 shares of stock to said defendants Kendall and Sanborn by said Kirberger, although plaintiff admits that both of said transactions were made, and caused to be made, in order to carry out and consummate said fraudulent plan and scheme of said defendants Kendall and Sanborn; and plaintiff further alleges that he, plaintiff, did not set up in his bill of complaint herein the recovery of his judgment against said Kake Packing Company in the District Court for Alaska at Juneau, and did not in said bill of complaint pray for relief against said defendant Sanborn-Cutting Co. for the amount of said judgment, together with costs therein and interest thereon, for the reason that plaintiff was advised and believed that by so doing he would subject his said bill of complaint to attack by all the defendants herein.

And plaintiff denies that large and heavy expenses will be inflicted upon the defendant Sanborn-Cutting Co. if plaintiff be permitted to prosecute his said suit in Alaska, or that said defendant Sanborn-Cutting Co. will suffer any expense whatsoever, except such expenses as it ought and should be made to suffer in an attempted defense of said suit.

And plaintiff denies each and every other allegation in said Paragraph II of said third affirmative defense of said answer contained.

All of which matters and things this plaintiff and repliant does ever aver to be true, and renews his prayer for relief as in his Bill of Complaint herein contained, and further prays that he have decree and judgment against the said defendant Sanborn-Cutting Co. for the sum of \$10,833.31, together with interest thereon at the legal rate from the 27th day of August, 1915, and that said defendant Sanborn-Cutting Co. be permanently restrained and enjoined from in any wise obtaining from the defendants Kendall and Sanborn, or either of them, said assignment of said claim of indebtedness of \$8,582.21, and that said defendant Sanborn-Cutting Co. be permanently restrained and enjoined from setting up or in any wise pleading the said assignment of said 125 shares of stock to said defendants Kendall and Sanborn and the said assignment of said claim of indebtedness of \$8,582.21 to said defendants Kendall and Sanborn, and plaintiff prays for his costs and disbursements herein and for such other and further relief as the Court may deem meet and equitable.

**GUNNISON & ROBERTSON and
JAMES J. CROSSLEY,**

Solicitors and Counsel for Plaintiff V. A. Paine.

United States of America,
Territory of Alaska,—ss.

V. A. Paine, being first duly sworn, on oath deposes and says: That he is the plaintiff in the foregoing en-

titled action; that he has read the foregoing Reply, and knows the contents thereof, and that the same is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

V. A. PAINE.

Subscribed and sworn to before me this 4th day of March, 1916.

R. E. ROBERTSON,

Notary Public in and for the Territory of Alaska.

(Seal.)

My Commission expires June 19, 1917.

Filed March 18, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 22nd day of March, 1916, there was duly filed in said Court and cause, a Stipulation to consolidate with this cause a cause instituted at Juneau, Alaska, and as to amendments to pleadings, in words and figures as follows, to-wit:

**STIPULATION TO CONSOLIDATE WITH
THIS CAUSE A CAUSE AT JUNEAU,
ALASKA, AND AS TO AMENDMENTS TO
PLEADINGS.**

It is hereby stipulated by and between the parties hereto, through their respective attorneys, as follows:

(1) That the above entitled suit and that certain suit No. 1405-A, heretofore instituted in the United

States District Court for the District of Alaska at Juneau, entitled V. A. Paine, as Trustee of the Kake Trading and Packing Company, a corporation, bankrupt, plaintiff, and the Kake Packing Company, a corporation, and the Sanborn Cutting Co., a corporation, defendants, may be and the same are hereby consolidated and may and shall be submitted to this Court in the suit now on trial for the determination of the merits thereof, subject to all rights of appeal and reservations of exceptions and objections.

(2) And the plaintiff's complaint herein may and shall be considered to be added to and amended by the complaint filed in said suit No. 1405-A, in the United States District Court at Juneau, and that it may and shall be considered further amended and added to by the separate replies filed in this suit; and that all the allegations and prayers of the complaint in said suit at Juneau, Alaska, and all the allegations and prayers in the replies and complaint in this suit, may and shall be considered to be the allegations and prayers of the complaint in this suit.

(3) That the respective answers of the defendants herein and the answer of the Sanborn Cutting Company filed in said suit at Juneau, together with all the allegations and prayers of all of said answers may and shall be considered to constitute the answers to complaint as amended by the additions and amendments set forth in Paragraph 2 hereof.

(4) That either party may amend its pleadings to conform to the evidence before the submission of the cause for decision.

(5) That plaintiff shall be permitted to use any documents or papers necessary to establish the issues of the suit No. 1405-A regardless of whether the same are originals or certified.

(6) That all the allegations in each and all of the defendants' separate answers and affirmative answers and defense and each of them shall be held and considered as denied, except as otherwise modified by plaintiff's allegations in his pleadings herein.

(7) That a certified copy of the complaint and answer in said suit No. 1405-A, at Juneau, is hereto attached and made a part hereof.

R. E. ROBERTSON,
JAMES J. CROSSLEY,
Solicitors and Counsel for Plaintiff.

G. C. FULTON,
Solicitors and Counsel for Defendants.

Filed March 22, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Wednesday, the 22nd day of March, 1916, the same being the 15th judicial day of the regular March, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO CONSOLIDATE WITH THIS
CAUSE A CAUSE INSTITUTED AT
JUNEAU, ALASKA, AND TO AMEND
PLEADINGS.

Now at this day come the plaintiffs by Mr. James J. Crossley and Mr. R. E. Robertson of counsel, and the defendants by Mr. George C. Fulton, of counsel; whereupon, pursuant to stipulation of the parties filed herein, IT IS ORDERED that this cause and a certain cause numbered 1405-A pending in the District Court of the United States for the District of Alaska at Juneau, entitled V. A. Paine as Trustee of the Kake Trading and Packing Company, a corporation, plaintiff, vs. The Kake Packing Company, a corporation, and the Sanborn Cutting Company, defendants, be, and the same is hereby, deemed consolidated with this cause for trial and determination of the merits, subject to all rights of appeal and reservations of exceptions and objections.

That the plaintiff's complaint herein be considered to be added to and amended by the complaint filed in said suit No. 1405-A in the United States District for the District of Alaska at Juneau, and shall be further amended and added to by the separate replies filed in this suit; and that all allegations and prayers in the complaint in said suit in said United States District Court for the District of Alaska, and all allegations and prayers and replies and complaint in this suit shall be considered to be the allegations and prayers of the complaint in this suit.

That the respective answers of the defendants herein and the answer of the Sanborn Cutting Company filed in said suit in said United States District Court for the District of Alaska, together with all the allegations and prayers of all of the said answers may and shall be considered to constitute the answer to the complaint as amended by the additions and amendments herein set forth.

That either party may amend its pleadings to conform to the evidence before the submission of this cause for decision.

That plaintiff shall be permitted to use any documents or papers necessary to establish the issues of the suit No. 1405-A regardless of whether the same be originals or certified.

That all the allegations in each and all of the defendants' separate answers or affirmative answers and defenses and each of them shall be held and considered as denied, except as otherwise modified by plaintiff's allegations in his pleadings herein.

R. S. BEAN,

Judge.

Filed March 22, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 22nd day of March, 1916, there was duly filed in said Court and cause, a copy of proceedings in cause instituted at Juneau, Alaska, as an amendment to the Bill of Complaint, in words and figures as follows, to-wit:

COPY OF PROCEEDINGS IN CAUSE INSTI-
TUTED AT JUNEAU, ALASKA, AS AN
AMENDMENT TO BILL OF COM-
PLAINT.

United States of America,
District of Alaska,
Division No. 1—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached are full, true, and correct copies of the original complaint and answer of defendant Sanborn-Cutting Co., in Cause No. 1405-A, V. A. Paine, as Trustee in Bankruptcy, etc., vs. Kake Packing Company, a corporation, and Sanborn-Cutting Co., a corporation, of record in my office.

In testimony whereof, I have subscribed my name and affixed the seal of the said Court at Juneau, Alaska, this 10th day of March, 1916.

|(Seal)

J. W. BELL, Clerk.

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

V. A. Paine, as Trustee in Bankruptcy of the
Kake Trading and Packing Company, a
Corporation, Bankrupt,

Plaintiff,

vs.

Kake Packing Company, a Corporation, and
Sanborn Cutting Company, a Corpora-
tion,

Defendant.

No. 1405-A. COMPLAINT.

Comes now the above named plaintiff as Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt, and, for cause of action, alleges:

I.

That plaintiff brings this action on behalf of himself as Trustee and on behalf of all other creditors of the defendant, Kake Packing Company, similarly situated who may desire to join herein and pay their proportionate share of the costs hereof.

II.

That heretofore, to-wit: on the 9th day of April, 1915, the Kake Trading and Packing Company, a corporation, was duly declared and adjudicated a bankrupt by the United States District Court for the District of Alaska, Division Number One, at Juneau, the Honorable Robert W. Jennings, Judge, presiding, sitting in Bankruptcy in said court, and thereafter and on the 8th day of May, 1915, plaintiff was duly elected and appointed Trustee in Bankruptcy of said Kake Trading and Packing Company, a corporation, bankrupt, and thereafter plaintiff duly qualified as such Trustee, and has been at all times since and is now the duly appointed, elected, qualified, and acting Trustee in Bankruptcy of said Kake Trading and Packing Company, a corporation, Bankrupt.

III.

That the above named defendant Kake Packing Company was at all the times hereinafter mentioned and is now a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and that it has filed in the office of the Clerk of the District Court of the District of Alaska, at Juneau, a certified copy of its purported Articles of Incorporation, financial statement and appointment and consent of resident agent in Alaska; that said defendant corporation has not filed or caused to be filed said papers or any of them in the office of the Secretary of the Territory of Alaska; and that said defendant corporation has not paid to the Territory of Alaska its annual license fees last due, for the years 1913, 1914, 1915 and 1916, or for any of said years.

IV.

That the above named defendant Sanborn Cutting Company was at all the times hereinafter mentioned and is now a corporation duly organized and existing under the laws of the State of Oregon; that said defendant corporation has not filed, or caused to be filed, in the office of the Clerk of the District Court at Juneau, or in the office of the Secretary of the Territory of Alaska, or in either of said offices, financial statement or report, or appointment and consent of resident agent, or either of any of said papers; that said defendant corporation has not paid to the Territory of Alaska its annual license fees last due for the years 1913, 1914, 1915 and 1916, or for any of said years; that said defendant is now

and has been at all times since on or about May 12, 1914, engaged in and operating and doing business in the First Division of the Territory of Alaska, and within the jurisdiction of this Court.

V.

That immediately upon the election, appointment, and qualification of plaintiff as such Trustee of said Kake Trading and Packing Company, a corporation, Bankrupt, he became the owner as such trustee of all the property and assets of said bankrupt, including the debt hereinafter referred to, and has been at all times since and is now under and by virtue of the Acts of Congress relating to bankruptcy and the laws of the United States and the Territory of Alaska, the owner of and entitled to the possession of all the property and assets, including the debt hereinafter referred to, of said bankrupt; and that the said debt hereinafter referred to is an asset of said estate in bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt, and that plaintiff as such Trustee is now the owner thereof.

VI.

That on the 27th day of August, 1915, at Juneau, Alaska, judgment was rendered against the above named defendant, Kake Packing Company, for the sum of Ten Thousand Three Hundred Thirty-three and $\frac{31}{100}$ (\$10,333.31) Dollars, with interest at the rate of Eight (8%) per cent per annum from the 31st day of January, 1915, in a certain action No. 1328-A,

brought by the plaintiff in the above entitled court, entitled "V. A. Paine, as Trustee of the Estate of Kake Trading and Packing Company, a corporation, Bankrupt, plaintiff, vs. Kake Packing Company, a corporation, defendant," which judgment was thereafter duly docketed in the records of said court; that a copy of said judgment is hereunto annexed, marked Exhibit "A," and specifically made a part hereof.

VII.

That on the 31st day of August, 1915, an execution was issued in said cause upon said judgment against said defendant Kake Packing Company, addressed to the United States Marshal for the First Division of the Territory of Alaska, in which Division of said Territory the said Kake Packing Company did, as hereinbefore stated, file with the Clerk of the District Court its Articles of Incorporation, financial statement and appointment and consent of resident agent, and in which division of said Territory said corporation did formerly conduct, carry on, and operate its business, and in which said Division and Territory the said property hereinafter described is located.

VIII.

That said execution has been returned by said United States Marshal wholly unsatisfied and no property found.

IX.

That on or about the 12th day of May, 1914, the said defendant Kake Packing Company, which was at

said time wrongfully, unlawfully and fraudulently dominated and controlled by the defendant, Sanborn Cutting Company, did, wrongfully, unlawfully and fraudulently and with the intent to hinder, delay and defraud the creditors of it, the said Kake Packing Company, and particularly with intent to hinder, delay and defraud the said Kake Trading and Packing Company, convey, by a bill of sale, duly delivered, a copy of which is hereunto annexed marked Exhibit "B," and specifically made a part hereof, all of its assets, and its entire assets, including the following described property, to-wit: All goods, wares, merchandise and chattels of every kind, nature, and description owned by it, or in which it has, or claims to have, any right, title, interest, or equity, all lumber, salmon, both canned and pickled, nets, webs, tins, tin cans, twine, gasoline and cannery supplies, and all cannery buildings, warehouses, bunk houses, and dwelling houses and its entire cannery plant situate at or near Kake, in the Territory of Alaska, and all machinery, tools, implements and equipment therein contained, or used in or about the conducting of its business there, and all boats, scows, traps and trap sites, and all trap paraphernalia, web, piles, pots, hearts and leads; all property of every kind, nature and description owned by, or in which it has any right, title, interest, or estate, whatsoever situate and wheresoever located; all right, title, interest and estate which it has of, in, or to all property, both real and personal, owned, or claimed to be owned, by it, or in which it has any right, title, interest, estate, or equity wheresoever situate, both at Astoria, Oregon, and in Alaska, including bills receivable and

chooses in action, water rights, conduits and water privileges, unto the said defendant Sanborn Cutting Company; that at said time the said Kake Trading and Packing Company, bankrupt, of which plaintiff is now Trustee in Bankruptcy as aforesaid, was a creditor of said defendant Kake Packing Company.

X.

That said conveyance purports to have been made for an alleged consideration of Seventy-two Thousand Six Hundred Twenty-one and 01/100 (\$72,621.01) Dollars, but that in truth and in fact the said defendant Sanborn Cutting Company is not a bona fide purchaser of said property for a valuable consideration, and did not pay a valuable, or any, consideration for said property as against said Kake Trading and Packing Company, or this plaintiff, its Trustee in Bankruptcy, but that to the contrary it the Sanborn Cutting Company took said property with full notice and knowledge of said fraudulent intent and purpose of the said Kake Packing Company, and with the intent to assist and aid said defendant Kake Packing Company in hindering, delaying and defrauding its creditors, and particularly in hindering, delaying and defrauding the said Kake Trading and Packing Company, of the collection and payment of their just and lawful claims and demands against it; that the directors of said two defendant corporations did on or about said day, unlawfully, wrongfully, and fraudulently scheme and conspire together with the particular intent and purpose to defraud the Kake Trading and Packing Company out of, and from

obtaining payment of, its said debt against the Kake Packing Company, and in pursuance to said conspiracy and scheme, did cause said conveyance to be made; that at the time of making said conveyance, the majority of the stock of said Kake Packing Company was wrongfully, unlawfully, and fraudulently controlled and dominated by the owners of the majority of the stock of said defendant, Sanborn Cutting Company; and at said time the Board of Directors or Trustees of said defendant Kake Packing Company was wrongfully, unlawfully, and fraudulently dominated and controlled by the Board of Directors or Trustees of said defendant, Sanborn Cutting Company; that at said time two of the Directors or Trustees of said defendant Sanborn Cutting Company were owners of the majority of the stock of said Sanborn Cutting Company and did wrongfully, unlawfully, and fraudulently dominate, control, hold, dictate, and use for their own purposes and benefits, the majority of stock in the Kake Packing Company; and that at said time one of said Directors or Trustees of defendant Sanborn Cutting Company was a director of the defendant, Kake Packing Company; and that said defendant Sanborn Cutting Company did wrongfully, and fraudulently, cause and compel said Kake Packing Company to convey unto it all of its assets, including the property hereinbefore described, with the intent and purpose to obtain the same without the payment of any consideration therefor save the payment of certain debts a large part of which said directors and their relatives held of the Kake Packing Company, which did not include the debt due the said Kake Trad-

ing and Packing Company, and with the intent and purpose to hinder, delay, and defraud all the other creditors of said defendant Kake Packing Company and particularly to hinder, delay, and defraud the Kake Trading and Packing Company; and that said defendant Kake Packing Company did wrongfully, unlawfully, and fraudulently convey said property to said defendant Sanborn Cutting Company with the intent and purpose as aforesaid, and the said Sanborn Cutting Company did receive and does now hold said property with full knowledge and notice: (a) that the said Kake Packing Company did at said time and still does owe just and lawful debts which had not at said time and have not since been paid; (b) that creditors of said defendant Kake Packing Company would be and are now being hindered, delayed, and defrauded in the collection of said just and lawful debts; and the defendant Sanborn Cutting Company wrongfully, unlawfully, and fraudulently took and received and now holds said property with full knowledge and notice that said property was and is subject to the payment of the lawful claims and demands of the creditors of said defendant Kake Packing Company; and plaintiff further alleges that said property was and is equitably subject to the payment of the debts of said Kake Packing Company.

XI.

That practically all of said property hereinbefore described was at the time of making of said conveyance, has been at all times since, and is now situate in the First Division of the Territory of Alaska, and within

the jurisdiction of this court; that the said defendant Sanborn Cutting Company at all times since has been and is now in possession of the said hereinbefore described property and has been at all times since and is now using, operating and conducting the same for its own use, advantages, and profits, and that it has made large and remunerative profits and earnings out of the use and operation thereof; and that it claims and pretends to be the owner of said property by virtue of said conveyance.

XII.

That there are and exist a large number of unpaid creditors of the said Kake Trading and Packing Company, Bankrupt, and that said creditors have filed in said bankruptcy proceedings proofs of their said claims and demands, and that the assets of said bankrupt, exclusive of said debt hereinbefore mentioned, are not sufficient to pay in full the lawful claims and demands of said creditors of said bankrupt.

XIII.

That the said creditors of said Kake Trading and Packing Company, a corporation, bankrupt, have been and are now being hindered, delayed, and defrauded in the collection of their said lawful claims and demands against said bankrupt by reason of said wrongful, unlawful, and fraudulent conveyance.

XIV.

That the Kake Trading and Packing Company, a corporation, bankrupt, and plaintiff, as its Trustee in

Bankruptcy, have been and are now being hindered, delayed, and defrauded in the collection of the said lawful debts, for which judgment was recovered as aforesaid, against said defendant Kake Packing Company by reason of said wrongful and fraudulent conveyance.

XV.

That the creditors of said Kake Trading and Packing Company, a corporation, Bankrupt, will be permanently hindered, delayed, and defrauded in the collection of their said lawful claims and demands against the bankrupt, and the said bankrupt and this plaintiff as its Trustee in Bankruptcy will be permanently hindered, delayed, and defrauded in the collection of their just claim, for which judgment was recovered as aforesaid, against said defendant Kake Packing Company, unless this Honorable Court require and command said defendant Sanborn Cutting Company to reconvey to said defendant Kake Packing Company the said property hereinbefore described; or decree that said property is held by said defendant Sanborn Cutting Company subject to the unpaid debts of said defendant Kake Packing Company, and that sufficient thereof be sold to pay said unpaid debts; or decree that said defendant Sanborn Cutting Company pay the unpaid debts of said defendant Kake Packing Company, including the said judgment recovered by plaintiff.

XVI.

That no part of said judgment has been paid and the whole thereof is due, and that there is now actually and

equitably due the plaintiff as Trustee upon said judgment, and the debt upon which said judgment was recovered, the sum of Ten Thousand Three Hundred Thirty-three and $31/100$ (\$10,333.31) Dollars, with interest from the 31st day of January, 1915, and costs in said suit No. 1328-A, amounting in all at the date of said judgment to the sum of Ten Thousand Eight Hundred Twenty-three and $14/100$ (\$10,823.14) Dollars, together with interest thereon from the date of said judgment; and that plaintiff has exhausted his remedies at law.

WHEREFORE, plaintiff prays that it be adjudged and decreed by the Court:

I. (a) That the conveyance of the assets of the Kake Packing Company to Sanborn Cutting Company is null and void, and requiring the said Sanborn Cutting Company to account for the use thereof and for the earnings and profits thereof and to make restitution of said assets, and of the profits and earnings thereon, to the said Kake Packing Company;

(b) Or, if restitution thereof cannot be had, that said property is held by said Sanborn Cutting Company subject to the debts of said Kake Packing Company and that sufficient of the same be sold to satisfy the unpaid debts of said Kake Packing Company, including the judgment recovered by plaintiff against said Kake Packing Company, or any execution issued thereon;

!(c) Or, if neither restitution nor sale thereof sufficient to satisfy said debt can be had, that said defendant Sanborn Cutting Company be required to pay the

unpaid debts of said Kake Packing Company including the said judgment recovered by this plaintiff, and for decree and judgment against said Sanborn Cutting Company, in the sum of Ten Thousand Eight Hundred Twenty-three and 14/100 (\$10,823.14) Dollars, with interest from August 27, 1914.

II. For his costs and disbursements herein.

III. For such other and further relief as may be meet and proper according to justice and equity.

GUNNISON & ROBERTSON,

Attorneys for Trustee, V. A. Paine, Plaintiff.

United States of America,
Territory of Alaska,
Division Number One,—ss.

V. A. Paine, being first duly sworn on oath, deposes and says that he is the plaintiff in the foregoing action; that he is the Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true as he verily believes.

V. A. PAINE.

Subscribed and sworn to before me this 1st day of December, 1915.

ROYAL A. GUNNISON,

Notary Public in and for the Territory of Alaska.

(Notarial Seal.)

My commission expires May 10, 1917.

EXHIBIT "A."

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

V. A. Paine, as Trustee of Estate of Kake
Trading and Packing Company, a Cor-
poration, Bankrupt,

Plaintiff,

vs.

Kake Packing Company, a Corporation,

Defendant.

No. 1328-A. JUDGMENT.

Now on this day this matter coming on for hearing upon the motion of the plaintiff for judgment to be entered herein, said plaintiff appearing by his attorneys, Messrs. Gunnison and Robertson, and defendants appearing not; and it appearing to the court that heretofore, to-wit: on July 10, 1915, complaint was filed herein, and that thereafter and on said day summons was duly issued commanding said defendant to be and appear in this court at Juneau, within thirty days from the date of the service of said summons and a copy of said complaint upon it; and it further appearing that thereafter, and on July 13, 1915, said summons, together with a copy of said complaint, was duly served upon said defendant, and it further appearing that thereafter and on the 23rd day of August, 1915, on application of said plaintiff, the said defendant having in no wise appeared herein and more than thirty days having expired since the time of the service of the said summons upon it,

the Clerk of this Court duly entered the default of said defendant; and said defendant now in no wise having appeared and answered plaintiff's complaint, is in default, and the Court being now fully advised in the premises;

Now, therefore, it is ordered and adjudged that the said plaintiff do have and recover judgment against said defendant for the sum of Ten Thousand Three Hundred Thirty-three and Thirty-one Cents (\$10,333.31) Dollars, with interest at the rate of Eight per centum per annum from the 31st day of January, 1915, and for his costs and disbursements herein incurred, taxed at the sum of Seventeen and 60/100 (\$17.60) Dollars.

Let execution issue in accordance herewith.

Done in open court this the 27th day of August, 1915.

ROBERT W. JENNINGS,
Judge of the District Court.

EXHIBIT "B."

Know All Men by These Presents:

That the Kake Packing Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Astoria, in Clatsop County, in said state, in consideration of the sum of Seventy-two Thousand Six Hundred Twenty-one and 01/100 (\$72,621.01) Dollars to it paid by Sanborn Cutting Co., a corporation organized and existing under and

by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Astoria, in Clatsop County, in said state, the receipt whereof is hereby acknowledged, has bargained, sold, transferred and assigned, and by these presents does hereby bargain, sell, transfer, convey and assign unto the said Sanborn Cutting Co., its successors and assigns, forever, the entire assets of the said Kake Packing Co., including all stock of merchandise, and including all goods, wares, merchandise, and chattels of every kind, nature, and description owned by it, or in which it has, or claims to have, any right, title, interest, or equity. This includes all lumber, salmon both canned and pickled, nets, webs, tins, tin cans, twine, gasoline, and cannery supplies, and all cannery buildings, warehouses, bunk houses, and dwelling houses, and includes its entire cannery plant situate at or near Kake, in the Territory of Alaska, and includes all machinery, tools, implements, and equipment therein contained, or used in or about the conducting of its business there, and also includes all boats, scows, traps, and trap sites, and all trap paraphernalia, web, piles, pots, hearts and leads.

This conveyance is intended to transfer and convey to the Sanborn Cutting Co., and vest in it, all property of every kind, nature, and description owned by the Kake Packing Co., or in which it has any right, title, interest, or estate wheresoever situate and wheresoever located, and the said Kake Packing Co. hereby transfers and assigns unto the said Sanborn Cutting Company, its successors and assigns, all right, title, interest,

and estate which it has of, in, or to all property, both real and personal, owned, or claimed to be owned by it, or in which it has any right, title, interest, estate, or equity wheresoever situate, both at Astoria, Oregon, and in Alaska, including bills receivable, and choses in action, water rights, conduits, and water privileges.

To have and to hold the above described property unto the said Sanborn Cutting Co., its successors and assigns forever.

In witness whereof, the said Kake Packing Co. has caused these presents to be executed by its President and Secretary and its corporate seal hereunto affixed this 12th day of May, A. D., 1914, pursuant to a resolution of its stockholders passed at a special meeting called for such purpose, and pursuant to a resolution of its Board of Directors heretofore duly adopted and passed.

Executed in the presence of:

G. C. FULTON.

F. P. KENDALL.

KAKE PACKING CO. (Seal)

By Ernest Kirberger, its President.

KAKE PACKING CO. (Seal)

By Geo. W. Sanborn, its Secretary.

(Corporate Seal of Kake Packing Company.)

State of Oregon,

County of Clatsop,—ss.

On this twelfth day of May, 1914, before me appeared Ernest Kirberger to me personally known, who

being duly sworn did say that he is the president of the Kake Packing Co. and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ernest Kirberger acknowledged said instrument to be the free act and deed of said corporation.

In testimony whereof I have hereunto set my hand and affixed my official seal this the day and year first in this may certificate written.

G. C. FULTON,

Notary Public for Oregon.

(Notarial Seal of G. C. Fulton.)

Filed in the District Court, District of Alaska, First Division, December 6, 1915, J. W. Bell, Clerk, by C. Z. Denny, Deputy.

(Endorsed)

No. 1405-A—In the District Court for the Territory of Alaska, Division No. 1, V. A. Paine, as Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, Bankrupt, Plaintiff, vs. Kake Packing Company and Sanborn Cutting Company, Defendants. Complaint. Gunnison & Robertson, Attorneys for plaintiff, 101-105 Decker Building, Juneau, Alaska.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

V. A. Paine, as Trustee in Bankruptcy of
the Kake Trading and Packing Company,
a Corporation, Bankrupt,

Plaintiff,

vs.

Kake Packing Company, a Corporation, and
Sanborn Cutting Company, a Corpora-
tion,

Defendant.

No. 1405-A.

ANSWER OF DEFENDANT SANBORN-
CUTTING CO.

Comes now the above named defendant Sanborn-Cutting Co., sued herein as San Born Cutting Company, for itself alone answering unto the complaint of the above named plaintiff, admits, alleges, and denies as follows, that is to say:

I.

That the true name of this defendant is and ever has been Sanborn-Cutting Co., and this defendant is, and during all the times mentioned in plaintiff's complaint and herein was, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and is now duly licensed and authorized to transact and engage in business in the Territory of Alaska.

II.

This defendant answering unto paragraph numbered II of said complaint alleges that it is informed that the allegations therein contained are true.

III.

This answering defendant answering unto paragraph numbered III of said complaint admits that the defendant Kake Packing Company was and is a corporation as therein alleged, but as to whether or not such defendant corporation has not filed or caused to be filed said or any papers, or a certified copy of its purported articles of incorporation, or financial statement or report, or appointment or consent of resident agent in Alaska, in the office of the Secretary of the Territory of Alaska, this defendant has no knowledge or information thereof sufficient to form a belief. Also this defendant alleges as to whether or not such defendant corporation has not paid to the Treasurer of the Territory of Alaska its annual license fees last due, or for the years 1913, 1914, 1915 or 1916, or either or any of said years, or any license fee, this answering defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

IV.

This answering defendant answering unto paragraph numbered IV of said complaint admits that this answering defendant as Sanborn-Cutting Co. was and is a corporation accordingly as therein alleged, but

denies all the other things and matters set forth and alleged in said paragraph, and particularly denies that it has not filed, or caused to be filed, in the office of the Clerk of the District Court at Juneau, or in the office of the Secretary of the Territory of Alaska, or in either of said offices, its financial statement or report, or appointment or consent of resident agent, or either or any of said papers, and denies that this defendant has not paid to the Treasurer of Alaska its annual license fees last due, and denies that there is due the Territory of Alaska from this defendant any license fees for the years 1913, 1914, 1915 or 1916, or either or any of said years, or any license fee whatever; but this defendant avers that it has at all times well and truly paid to the Secretary of the Territory of Alaska all license fees and taxes due from this defendant to the Territory of Alaska, and has, in all respects, complied with the laws of the Territory of Alaska. This defendant admits that its place of business is within the jurisdiction of this court, but as to all other matters and things set forth and alleged in said paragraph not herein specifically admitted, this defendant denies.

V.

This answering defendant answering unto paragraph numbered V of said complaint admits that upon the election, appointment, and qualification of the plaintiff herein as Trustee of said Kake Trading and Packing Company, he became, as such Trustee, the owner of all the property and assets of said bankrupt, and is now, and at all times since under and by virtue of his appoint-

ment and qualification and the laws of the United States and of the Territory of Alaska has been, the owner of all, and entitled to the possession of all, the property and assets of said Kake Trading and Packing Company, but specifically denies that the said plaintiff, as Trustee or otherwise, or at all, is now or ever was, or ever has been at any time, the owner of the debt therein alleged and therein mentioned, or the indebtedness thereafter referred to in said complaint, and denies that the said debt, or any debt referred to in said complaint, is or was an asset of said estate in bankruptcy of the Kake Trading and Packing Company, and denies that the plaintiff, as such Trustee, is now, or ever was, or at any time, the owner of the same, or of any right, title, interest, or estate therein or thereto; but, on the contrary, this defendant alleges that long prior to the institution of the proceedings wherein the said Kake Trading and Packing Company was adjudicated a bankrupt, to-wit, on the 6th day of January, 1914, the said Kake Trading and Packing Company being then and there a solvent and going corporation for a valuable consideration to it in hand paid by F. P. Kendall and George W. Sanborn, of Astoria, Oregon, duly assigned and transferred, sold and delivered unto the said F. P. Kendall and Geo. W. Sanborn the said indebtedness set forth and referred to in said paragraph number V of said complaint, and the indebtedness set forth and alleged in said complaint, and therein duly transferred, assigned, and set over unto the said F. P. Kendall and Geo. W. Sanborn the claim and chose in action which the said Kake Trading and Packing Company had, or claimed to have, against the

said Kake Packing Company, and thereupon the said F. P. Kendall and Geo. W. Sanborn became the owners of said claim and chose in action and said indebtedness set forth and alleged in plaintiff's complaint, and ever since have been and still are such owners, all of which is more fully hereinafter set forth and alleged.

VI.

This answering defendant answering unto paragraph numbered VI of said complaint denies the same, and the whole thereof, and each and every allegation therein contained, and avers that if the records of said court show the entry of any judgment upon the said alleged account that the same was obtained through fraud on the part of the plaintiff herein and by false swearing and perjury, for that the said plaintiff never at any time owned or acquired any right, title, interest, or estate of, in or to the said claim of the said Kake Trading and Packing Company against the said Kake Packing Company, for that the said claim was, long prior to the time any proceedings was instituted to have the said Kake Trading and Packing Company adjudged a bankrupt, by said Kake Trading and Packing Company duly assigned to and owned by the said F. P. Kendall and Geo. W. Sanborn, of Astoria, Oregon, of which the plaintiff herein had full notice and knowledge. That the said account was duly assigned to the said F. P. Kendall and Geo. W. Sanborn by said Kake Trading and Packing Company, and of which the plaintiff herein at and prior to the institution of the alleged action set forth in said paragraph VI had full notice and

knowledge, all of which is more fully hereinafter set forth and alleged.

VII.

This answering defendant answering unto paragraphs numbered VII and VIII of said complaint alleges that it has no knowledge or information thereof, or of any allegation therein contained, sufficient to form a belief, and therefore denies the same and each and every allegation set forth and contained in said paragraphs numbered VII and VIII, and the whole thereof.

VIII.

This answering defendant answering unto paragraph numbered IX of said complaint denies the same, and the whole thereof, and each and every allegation therein contained, save and excepting this defendant admits that on the 12th day of May, 1914, the said defendant Kake Packing Company executed and delivered unto this defendant a deed of conveyance substantially as set forth in Exhibit "B" attached to plaintiff's complaint, by which conveyance, the said Kake Packing Company, for the consideration therein expressed, sold and delivered unto this defendant the entire assets of said Kake Packing Company, and that pursuant to such transfer and assignment, this defendant immediately entered into and took possession of the entire assets of said Kake Packing Company, claiming to own the same, and the whole thereof, and still claims to own the same, and that this defendant accordingly paid said Kake Packing Company said consideration in gold coin of the

United States of America, namely, \$72,621.01, and this answering defendant has been compelled to pay in addition thereto the further sum of \$8,556.17, making a total consideration which this answering defendant has paid for the transfer to it of the assets of said Kake Packing Company the full sum of \$81,177.18, and the said Kake Packing Company duly received said sum from this answering defendant. That said transaction took place in the State of Oregon, at the City of Astoria, in Clatsop County in said state, at the time when said F. P. Kendall and Geo. W. Sanborn were the owners of all claims and demands which said Kake Trading and Packing Company had, or claimed to have, against the defendant Kake Packing Company. This defendant admits that by said conveyance executed by said Kake Packing Company in favor of this answering defendant, of May 12, 1914, the said Kake Packing Company duly transferred and assigned to it all goods, wares, merchandise, and chattels of every kind, nature, and description owned by it, or in which it had, or claimed to have, any right, title, interest, or equity, and included all of the lumber, salmon, both canned and pickled, nets, web, tins, tin cans, twine, gasoline and cannery supplies, cannery buildings, warehouses, bunk houses, dwelling houses, and its entire cannery plant situate at or near Kake, in the Territory of Alaska, and all machinery, tools, implements, and equipment therein contained, or used in or about the conducting of its business there, also all boats, scows, traps, trap sites, and all trap paraphernalia, web, piles, pots, hearts, and leads, and all property of every kind, nature, and description owned by or in which the

Kake Packing Company then had any right, title, interest, or estate, and wheresoever situated and wheresoever located, and all right, title, interest, and estate which said Kake Packing Company had of, in, or to all property, both real and personal, owned, or claimed to be owned, by it, or in which it had any right, title, interest, estate, or equity, and wheresoever situated, both at Astoria, Oregon, and in the Territory of Alaska, including bills receivable and choses in action, water right, conduits, and water privileges; but this answering defendant specifically denies that at the time of said transfer, or at any time since, the Kake Trading and Packing Company, or the plaintiff herein, as its Trustee in Bankruptcy, was a creditor of said Kake Packing Company; on the contrary, alleges that neither the said Kake Trading and Packing Company, nor the plaintiff herein as Trustee in Bankruptcy thereof, had any claim against said Kake Packing Company, for that the claim alleged and set forth in plaintiff's complaint was, long prior thereto, for a good and valuable consideration in hand paid the Kake Trading and Packing Company by F. P. Kendall and Geo. W. Sanborn, duly transferred and assigned to and owned by said F. P. Kendall and Geo. W. Sanborn, and was not owned by the said Kake Trading or Packing Company, or by the plaintiff herein as its Trustee in Bankruptcy, all of which the said plaintiff knew at the time he qualified as such Trustee and has known ever since.

IX.

This answering defendant answering unto paragraph numbered X of said complaint denies the same,

and the whole thereof, and each and every allegation therein contained, save and excepting, however, this defendant admits that the said instrument of May 12, 1914, whereby the said Kake Packing Company conveyed to defendant herein all of its property recites the payment to the Kake Packing Company of the consideration of \$72,621.01. This defendant alleges that said sum was actually paid to said Kake Packing Company by this answering defendant in gold coin of the United States of America long prior to the institution of this action, and long prior to the time proceedings were instituted to have the said Kake Trading and Packing Company adjudicated a bankrupt, and prior to the adjudication of its bankruptcy, and without notice or knowledge on the part of the defendant herein that said Kake Trading and Packing Company was insolvent, and whilst said Kake Trading and Packing Company was a going concern, and this defendant also alleges that long prior to the institution of the proceedings to have the Kake Trading and Packing Company adjudicated a bankrupt, and long prior to the appointment of the plaintiff herein as Trustee in Bankruptcy, the said Kake Packing Company well and truly and fully paid in gold coin of the United States of America every claim and demand of every kind, nature, and description which the said Kake Trading and Packing Company had or held against it, including the indebtedness set forth and alleged in plaintiff's complaint.

X.

This defendant answering unto paragraph numbered XI of said complaint denies that practically all of

the property described in said complaint was at the time of the making of said conveyance, or has been at all times, or at all, or is now, situated in the First Division of the Territory of Alaska, or within the jurisdiction of this court, but admits that the cannery building and machinery, boats and nets and paraphernalia are within the jurisdiction of this court, and that this defendant took possession of the assets transferred to it, but has not now any of the canned salmon or tin or cannery supplies so transferred to it in its possession. This defendant also admits that it has been using and operating the said cannery since the transfer to it during each fish canning season; but denies that it had made large and remunerative profits and earnings therefrom. This defendant, however, admits that it claims to be the owner of said property by virtue of the conveyance and transfer to it made by the said Kake Packing Company, of date May 12, 1914, and alleges that this defendant fully paid as consideration for the transfer to it of said property in cash, gold coin of the United States of America, the full sum of \$81,177.18, which it stands ready at any time to prove by proper and competent evidence to this court.

XI.

This defendant answering unto paragraph numbered XII of said complaint alleges that it has no knowledge or information thereof, or of any allegation therein contained, sufficient to form a belief, and therefore denies the same, and the whole thereof, and each and every allegation therein contained.

XII.

This defendant answering unto paragraph numbered XIII of said complaint denies the same and the whole thereof and each and every allegation therein contained.

XIII.

This defendant answering unto paragraph numbered XIV of said complaint denies the same, and the whole thereof, and each and every allegation therein contained.

XIV.

This defendant answering unto paragraph numbered XV of said complaint denies the same, and the whole thereof, and each and every allegation therein contained.

XV.

This defendant answering unto paragraph numbered XVI of said complaint denies the same, and the whole thereof, and each and every allegation therein contained.

AFFIRMATIVE DEFENSE.

This answering defendant for a further and separate answer and defense to the matters and things set forth in plaintiff's complaint herein and particularly with reference to that portion of said complaint wherein it is alleged that the plaintiff herein, as Trustee for the Kake Trading and Packing Company, obtained in the above

entitled court a judgment against the defendant Kake Packing Company, as well as to all other matters in said complaint alleged and as and for an affirmative defense, alleges:

I.

That this answering defendant is, and during all the times herein mentioned was, a private corporation, duly organized and existing under and by virtue of the laws of the State of Oregon, and engaged in and transacting business in the State of Oregon. That its principal office and place of business is at the City of Astoria, in Clatsop County, State of Oregon. That prior to June 1, 1914, this defendant had never transacted any business in the Territory of Alaska, but after acquiring the properties hereinafter specified, this defendant duly complied with all the laws of the Territory of Alaska providing the manner in which foreign corporations are authorized to transact business in such territory, and duly paid its license fee therefor, and is duly licensed and authorized to engage in and transact business in the Territory of Alaska.

II.

That the Kake Trading and Packing Company was during all the times herein mentioned a private corporation incorporated and existing under and by virtue of the laws of Washington, and was engaged in business at Kake, in the Territory of Alaska. That said Kake Trading and Packing Company was managed exclusively by one Ernest Kirberger. That said Ernest Kirber-

ger had entire charge of the business of said corporation, and for many years and during the times hereinafter mentioned carried on and conducted the business of such corporation by and with the consent and approval of the officers and stockholders thereof, he being, as this defendant is informed and believes, and therefore alleges the truth to be, the President and General Manager of said corporation. That such corporation was engaged in the mercantile business at Kake, in the Territory of Alaska, such business being at all times controlled, operated, and managed by said Ernest Kirberger, accordingly as aforesaid.

III.

That the defendant Kake Packing Company was during all the times mentioned in said complaint a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business at the City of Astoria, in Clatsop County, State of Oregon. That said Ernest Kirberger was also President and General Manager of said Kake Packing Company. That said Kake Packing Company, after its organization, through Ernest Kirberger, its President and General Manager, during the year 1912, constructed, and during the salmon fishing season of 1912 and 1913 operated, a salmon cannery at Kake, in the Territory of Alaska. That said Ernest Kirberger had full charge and control of said corporation, and transacted all business pertaining thereto, and contracted all indebtedness. That at the close of the fishing season in Alaska for the season of 1913, the books

of the said defendant Kake Packing Company as kept under the direction and supervision of said Ernest Kirberger showed that the assets of said Kake Packing Company aggregated the sum of \$76,300.65, and that the liabilities of said corporation aggregated the sum of \$81,203.22.

That it was impossible to raise sufficient money to satisfy the claims against said Kake Packing Company, and the assets of said corporation were not worth, as a matter of fact, \$76,300.65, in fact, the assets thereof did not exceed the sum of \$65,000.00, and if the same had been sold to satisfy said indebtedness either by a Trustee in Bankruptcy or under execution, the same would not have realized to exceed \$40,000.00 and the creditors of said corporation would not have received over fifty per cent (50%) of the indebtedness of such corporation.

That said Kake Packing Company was wholly unable to obtain financial aid to continue operating, and it became and was apparent that the creditors thereof would suffer a great loss. That thereupon, and on the 6th day of January, 1914, the said Kake Trading and Packing Company being then a going concern, for a good and valuable consideration to it paid by F. P. Kendall and Geo. W. Sanborn, at Astoria, Oregon, duly sold and assigned to said F. P. Kendall and Geo. W. Sanborn its entire claim against said Kake Packing Company, aggregating the sum of \$8,582.21, and no more, being the same claim upon which plaintiff claims he obtained judgment against said Kake Packing Company, alleged upon in paragraph numbered VI in the

complaint filed herein, and thereupon said F. P. Kendall and Geo. W. Sanborn became and were, and ever since have been, the sole and exclusive owners of said claim, and the whole thereof, and the same did not become and was not an asset of said Kake Trading and Packing Company at the time proceedings were instituted to have it adjudged a bankrupt, and the said District Court of the District of Alaska, Division Number One, at Juneau, did not acquire jurisdiction thereof. But, nevertheless, the said plaintiff herein well knowing the fact that the said Kake Trading and Packing Company had honestly and for a good and valuable consideration assigned and transferred its claim, and all claims that it had against the defendant Kake Packing Company, on said January 6, 1914, to said F. P. Kendall and Geo. W. Sanborn, and well knowing that the said Kake Trading and Packing Company did not own such claim, and well knowing that the said Kake Packing Company was not indebted to the Kake Trading and Packing Company in any sum or amount whatever, and well knowing that the defendant Kake Packing Company was indebted to said F. P. Kendall and Geo. W. Sanborn for the claim sued upon described in plaintiff's complaint, wrongfully and fraudulently instituted an action in the above entitled court, as Trustee of the Kake Trading and Packing Company, a bankrupt, against the said Kake Packing Company, a corporation, as defendant, and in the complaint filed in said cause, the said plaintiff herein, as Trustee, falsely stated and alleged that said Kake Packing Company was indebted to him, as Trustee, in the sum of \$10,333.31, with

interest at the rate of 8% per annum from the 31st day of January, 1915. That said statement was false and the said plaintiff herein well knew the same to be false, but nevertheless, for the purpose of deceiving said court, the plaintiff herein, as such Trustee, verified said complaint, and thereafter, based on said false statements and by reason thereof, and not otherwise, an alleged and pretended judgment in due form of law was entered by this court in said cause on the 27th day of August, 1915, in favor of the plaintiff herein and against said defendant Kake Packing Company, the defendant herein, for the sum of \$10,333.31, and costs of action, with interest thereon at 8% per annum until paid. That said judgment was false and fraudulent, and rendered and entered in fraud of the rights of this answering defendant, for that the said Kake Packing Company was not, at the institution of said suit, or at any time thereafter, indebted to said Kake Trading and Packing Company in any sum or amount whatever, and the claim sued upon had been, long prior thereto, and whilst said Kake Trading and Packing Company was a going concern, and on January 6, 1914, over one year prior to the proceedings instituted to have said Kake Trading and Packing Company adjudged a bankrupt, by said Kake Trading and Packing Company duly assigned by F. P. Kendall and Geo. W. Sanborn, as aforesaid, and was received by them, and never became an asset of said Kake Trading and Packing Company, and did not pass to its Trustee in Bankruptcy.

That the judgment herein mentioned is the same judgment mentioned in plaintiff's complaint, and none other, and the claim hereof of \$8582.21 is the identical

claim of \$10,333.31 mentioned in plaintiff's complaint, and none other, and the transactions herein alleged are the same transactions alleged in plaintiff's complaint, and none other.

This answering defendant for a further and separate answer and defense to the cause of suit set forth and alleged in plaintiff's complaint alleges:

I.

That this answering defendant is, and during all the times herein mentioned was, a private corporation, duly organized and existing under and by virtue of the laws of the state of Oregon, and engaged in and transacting business in the state of Oregon. That its principal office and place of business is at the city of Astoria, in Clatsop county, state of Oregon. That prior to June 1, 1914, this defendant had never transacted any business in the Territory of Alaska, but after acquiring the properties hereinafter specified, this defendant duly complied with all the laws of the Territory of Alaska providing the manner in which foreign corporations are authorized to transact business in such territory, and duly paid its license fee therefor, and is duly licensed and authorized to engage in and transact business in the Territory of Alaska.

II.

That the Kake Trading and Packing Company was during all the times herein mentioned a private corporation incorporated and existing under and by virtue of the

laws of Washington, and was engaged in business at Kake, in the Territory of Alaska. That said Kake Trading and Packing Company was managed exclusively by one Ernest Kirberger. That said Ernest Kirberger had entire charge of the business of said corporation, and for many years and during the times hereinafter mentioned carried on and conducted the business of such corporation as if he owned the entire corporation by and with the consent and approval of the officers and stockholders of said corporation, he being, as this defendant is informed and believes, and therefore alleges the truth to be, the President and General Manager of said corporation. That such corporation was engaged in the mercantile business at Kake, in the Territory of Alaska, such business being at all times controlled, operated, and managed by said Ernest Kirberger, accordingly as aforesaid.

III.

That the defendant Kake Packing Company is, and during all the times mentioned in said complaint and herein mentioned was, a corporation organized and existing under and by virtue of the laws of the state of Oregon, with its principal office and place of business at the city of Astoria, in Clatsop County, state of Oregon, and by its Articles of Incorporation was duly authorized and empowered to engage in the business of constructing and operating a salmon fish cannery and canning and processing fish and other food products, both in Oregon and in the Territory of Alaska, and that one Ernest Kirberger was at the organization of such cor-

poration duly elected President and General Manager thereof, and duly entered upon the discharge of his duties as such thereafter continued to be such.

IV.

That the said defendant Kake Packing Company, after its organization, through said Ernest Kirberger, its President and General Manager, constructed and fully equipped, prior to the beginning of the salmon fishing season of 1912, a salmon cannery at Kake, in the Territory of Alaska, and operated such cannery at Kake, in the Territory of Alaska, and operated such cannery during the seasons of 1912 and 1913. That said Ernest Kirberger had full charge and control of said corporation and the operation of said cannery during said seasons, and contracted all indebtedness of said corporation, and kept all the books thereof.

That at the close of the fishing season in Alaska, for the year 1913, it was discovered that the said cannery had been operated at a very great loss, and that its indebtedness aggregated the sum of \$81,203.21. That although the books of the corporation showed that its assets aggregated the sum of \$76,300.65, as a matter of fact, the assets of such corporation at that time did not exceed in value the sum of \$65,000.00.

That among the liabilities of said defendant Kake Packing Company was a claim of the Kake Trading and Packing Company for goods, wares, and merchandise by it sold and delivered to said Kake Packing Company aggregating the sum of \$8582.21, which had been there-

tofore transferred and assigned to F. P. Kendall and Geo. W. Sanborn. That had the assets of said corporation been sold to satisfy its indebtedness either through a Trustee in Bankruptcy, or under forced sale of any kind, the creditors of said corporation would have received practically nothing.

That said corporation was wholly unable to obtain any financial aid either to further conduct or carry on its business, or to satisfy or discharge its indebtedness. That on and prior to the 11th day of May, 1914, the said Kake Packing Company offered to sell to this defendant its entire assets and cannery business at Kake, in the Territory of Alaska, for the consideration of \$72,621.01, which sum the said Kake Packing Company then and there represented and stated to this defendant included its entire indebtedness, and such defendant, through its said President and General Manager, Ernest Kirberger, then and there furnished this defendant with a statement in writing, which it was represented contained the names of all of the creditors of such corporation, together with the true amount due each creditor from such corporation. Thereupon, this defendant accepted said offer and agreed to pay the said Kake Packing Company the said sum of \$72,621.01 as full consideration for the sale and transfer to this defendant of the entire assets and business of said corporation, and that the said consideration should be paid to the creditors of said corporation.

That thereupon, in order to carry out the terms of said contract, a special meeting of the stockholders of said Kake Packing Company was duly called and held

on the 11th day of May, 1914, for the purpose of authorizing the sale of the entire assets of such corporation. That such meeting was held pursuant to due and legal notice given to each stockholder in accordance with and within the time provided by the by-laws of such corporation. That there were present and participating at such meeting shares of stock, the said Ernest Kirberger representing and voting the 125 shares of stock. That a resolution was adopted at such meeting by the unanimous vote of all the said stockholders of said corporation then present, authorizing and directing the Board of Directors to sell the entire assets, property, and business of said Kake Packing Company to this defendant for the sum of \$72,621.01, which sum should be paid to the creditors of said corporation. That each stockholder present voted in favor of said resolution.

That thereafter, at a special meeting of the Board of Directors of said Kake Packing Company held at the office of said corporation at Astoria, Oregon, after the adjournment of said stockholders' meeting aforesaid, on May 11, 1914, a resolution was adopted and passed by the said Board of Directors authorizing and directing the President and Secretary of the corporation, on behalf of said corporation, to sell and transfer to this defendant for the consideration of \$72,621.01 the entire assets of said corporation, including all property of every kind, nature and description owned by it. That every director of said corporation was present at such meeting, and each director voted in favor of the adoption of said resolution. That thereupon, and pursuant to such resolution, the said Kake Packing Company, through its President

and Secretary, and the seal of said corporation Kake Packing Company, on May 12, 1914, executed and delivered unto this defendant a good and sufficient deed of conveyance in writing, duly executed, witnessed, and acknowledged, wherein and whereby the said Kake Packing Company, defendant herein, duly conveyed, transferred, and assigned to this defendant the entire assets and property of said defendant Kake Packing Company by the following description, to wit:

The entire assets of said Kake Packing Company, including all stock of merchandise, and including all goods, wares, merchandise and chattels of every kind, nature, and description owned by it, or in which it has, or claims to have any right, title, interest, or equity, including all lumber, salmon both canned and pickled, nets, web, tins, tin cans, twine, gasoline, and cannery supplies and all cannery buildings, warehouses, bunkhouses, and dwelling houses, and the entire cannery plant at or near Kake, in the Territory of Alaska, and including all machinery, tools, implements, and equipment therein contained, or used in or about the conducting of the business of such corporation, including all boats, scows, traps, and trap sites, and all trap paraphernalia, web, piles, pots, hearts, and leads, also all property of every kind, nature, and description owned by the Kake Packing Company, or in which it has any right, title, interest, or estate whatsoever situate and wheresoever located, together with all right, title, interest, and estate that said Kake Packing Company had in or to the property, both real and personal, owned or claimed to be owned by it, or in which it had any right, title, interest, estate, or equity, whereso-

ever situate, both at Astoria, Oregon, and in Alaska, including bills receivable and choses in action, water rights, conduits, and water privileges. That Exhibit "B" attached to plaintiff's complaint herein is substantially a copy of said conveyance. That immediately upon the execution and delivery of said conveyance to this defendant, and on said May 12, 1914, this defendant entered into the possession of the said property and premises so transferred and conveyed, and of the whole thereof, and has ever since been in the possession of the same, excepting this defendant has from time to time sold and disposed of the cannery supplies and some of the property has been destroyed; otherwise, it is in the possession of all of the chattels thereby transferred and thereby conveyed. That upon the delivery to this defendant of said conveyance of May 12, 1914, the said Kake Packing Company, through its President and General Manager aforesaid, delivered to this defendant a statement in writing, containing the names of each creditor of said corporation and the true amount which such corporation represented was due from it to all its creditors, aggregating the sum total of \$72,621.01, not including the claim of \$8582.21 owned by said Kendall and Sanborn. That this defendant relied upon the statement so made and believed that the total amount due said creditors aggregated said sum last above mentioned, and by reason thereof undertook, promised, and agreed to assume and pay said claims in full. That after defendant had made said agreement and was proceeding to pay said claims, defendant discovered that instead of the said claims aggregating the sum of \$72,621.01, the total of

said claims aggregated the sum of \$81,177.18, and this defendant was compelled to and did pay said sum of \$81,177.18, which was the true consideration which this defendant paid as the purchase price of the said properties conveyed to defendant by said Kake Packing Company by said conveyance of May 12, 1914.

Therefore, this defendant alleges that it is, and ever since the 12th day of May, 1914, has been, the legal, equitable, and true owner of all and singular the properties described in plaintiff's complaint and all properties and assets, real estate, and personal property which the defendant Kake Packing Company owned at the time of the execution of said conveyance of May 12, 1914, hereinbefore alleged, and that plaintiff herein, as Trustee, has neither right, title, interest, estate, nor equity therein or thereto.

V.

This defendant further alleges that the said plaintiff herein, as Trustee of the Kake Trading and Packing Company, a bankrupt, wrongfully and without right and to the injury and damage of this defendant, has claimed and still claims that the sale and transfer by the Kake Packing Company of its properties and assets to this defendant was fraudulent and void, which claim interferes with this defendant in the conducting and operation of its business, and in the handling of the business affairs pertaining to its cannery at Kake, Alaska, being a portion of the property conveyed to it by the Kake Packing Company. That said claim of plaintiff herein is wrong-

ful and not based upon any right, title, or equity, and this defendant is entitled to a decree enjoining the said plaintiff, as Trustee, from claiming any right, title, interest, or estate in or to said properties, or any part thereof, and from claiming, contending, or pleading that the sale and transfer of such property to this defendant was fraudulent or void as to either the plaintiff, as Trustee, or any creditor of the Kake Packing Company.

This defendant for a further and separate answer and defense to the matters and things set forth in plaintiff's complaint alleges:

I.

That the said plaintiff ought not to be permitted to claim, allege, or plead that the sale and conveyance to this defendant of the properties and assets of the Kake Packing Company was in fraud of the rights of the creditors, or any creditor, of the Kake Packing Company, or void as to such creditors, and ought not be permitted to allege, claim, or plead that the same should be set aside and such properties restored to the Kake Packing Company, for that this defendant honestly and in good faith purchased of and from the Kake Packing Company all of its said assets and properties described in plaintiff's complaint for the full consideration of \$81,177.18, paying therefor the full consideration in United States gold coin, which sum the said Kake Packing Company received from this defendant and which sum the said Kake Packing Company applied to the said indebtedness of such corporation, and that the said plaintiff has not offered to repay the defendant said consider-

ation so paid by this defendant, and has not tendered said sum into court for the use of the defendant, or for a transfer of such properties to the plaintiff herein, accordingly as provided by the laws of the United States in such cases made and provided. Therefore, this defendant alleges that plaintiff is and ought to be estopped from pleading, alleging, or contending that the sale and transfer of the Kake Packing Company and the conveyance by it to defendant of its properties and assets is void, or that this defendant should reconvey the same to the plaintiff herein, or account to plaintiff, or pay plaintiff herein, any sum or amount whatever.

WHEREFORE, by reason of the premises, this defendant demands judgment and decree—

FIRST: That this defendant be adjudged and decreed to be the owner in its own right of all of the properties and assets of every kind, nature, and description, accordingly as in this answer described, which the Kake Packing Company owned or had any interest on May 12, 1914, and that there was conveyed to this defendant by said Kake Packing Company by said conveyance of May 12, 1914, all properties of said Kake Packing Company, and that the plaintiff herein, as Trustee, has neither right, title, interest, nor estate therein or thereto, or equity therein or thereto, and that such plaintiff, as Trustee herein, be enjoined and restrained from contending, claiming, or pleading that said transfer of said property is fraudulent or void, or that he has, as such Trustee, any equity therein or thereto.

SECOND: That the said plaintiff herein take nothing by this suit.

THIRD: That this defendant have such other and further decree in the premises as to this Honorable Court may seem equitable and just, and that it have its costs and disbursements herein.

**SHACKLEFORD & BAYLESS,
G. C. and A. C. FULTON,**

Attorneys for Defendant Sanborn-Cutting Co.

State of Oregon,
County of Clatsop,—ss.

I, Geo. W. Sanborn, being first duly sworn, depose and say that I am the President of the defendant Sanborn-Cutting Co., in the above entitled suit, and that the foregoing answer is true, as I verily believe.

GEO. W. SANBORN .

Subscribed and sworn to before me this 7th day of February, 1916.

(Notarial Seal)

G. C. FULTON,

Notary Public for Oregon.

My commission expires Dec. 18, 191 . .

Due service of the within answer is hereby accepted this 12th day of February, 1916.

**GUNNISON & ROBERTSON,
Attorneys for Plaintiff.**

Filed in the District Court, District of Alaska, First Division, February 12, 1916, J. W. Bell, Clerk, by C. Z. Denny, Deputy.

(Endorsed) No. 1405-A. In the District Court for the District of Alaska, Division Number One, at Juneau. V. A. Paine, as Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, bankrupt, Plaintiff, vs. Kake Packing Company (a corporation) and Sanborn-Cutting Company (a corporation), Defendants. Answer of Defendant Sanborn-Cutting Co. Shackleford & Bayless, G. C. and A. C. Fulton, attorneys for defendant Sanborn-Cutting Co.

In the District Court for the District of Alaska.

Division Number One. At Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that Cause No. 1405-A, entitled V. A. Paine, as Trustee in Bankruptcy of the Kake Trading and Packing Company, a corporation, Bankrupt, Plaintiff, vs. Kake Packing Company, a corporation, and Sanborn-Cutting Company, a corporation, Defendants, is now pending in the above entitled court, and is the same case in which certified copies of complaint and answer were made on March 10, 1916, by this office.

In testimony whereof, I have subscribed my name and affixed the seal of the said court at Juneau, Alaska, this 14th day of March, 1916.

(Seal)

J. W. BELL,

Clerk of the District Court, District of Alaska,

Division No. One.

Filed March 22, 1916, G. H. Marsh, Clerk, United States District Court, District of Oregon.

And afterwards, to wit, on the 1st day of May, 1916, there was duly filed in said Court and cause, an Opinion, in words and figures as follows, to wit:

OPINION.

Gunnison & Robertson and James J. Crossley, attorneys for plaintiff.

G. C. and A. C. Fulton, attorneys for defendants.

Portland, Oregon, Monday, April 17, 1916.

Memorandum by Bean, District Judge:

The defendant Gordon took no part in the transactions out of which this controversy arose and as to him the suit should be dismissed with costs.

The pleadings abound in charges of fraud and misconduct on the part of the defendants Sanborn and Kendall, but such charges are not sustained by the testimony. The evidence shows quite clearly that there was no actual fraud or moral turpitude in any of the transactions involved in this suit, but that all parties concerned, including Kerberger, acted in the utmost good faith and with no intention to wrong anyone. The only question is the legal effect of what they did.

On February 19, 1912, and for some years prior thereto and thereafter until it was adjudged a bankrupt, the Kake Trading and Packing Company (hereinafter

referred to as the Trading Company), was a corporation organized under the laws of Washington, doing a general mercantile and trading business at Kake, Alaska. Ernest Kerberger was the president and general manager and the owner of all of the capital stock except two shares. Kerberger was very anxious to establish a salmon canning plant at Kake, and through him the defendants Sanborn, Kendall and Gordon, residing at Astoria in this state, became interested in the matter, and on February 19, 1912, they and Mr. Kerberger organized a corporation under the laws of Oregon, known as the Kake Packing Company (hereinafter referred to as the Packing Company), with a capital stock of fifty thousand dollars, divided into five hundred shares with a par value of one hundred dollars each. Kerberger subscribed for 125 shares for himself and 60 shares for his brother; Sanborn and Kendall each became the owner of 85 shares, and Gordon of 60 shares. Kerberger, Sanborn, Kendall and Gordon were elected members of the Board of Directors, and Kirberger President and General Manager. Gordon served as a director until January, 1913, when he was succeeded by another, since which time he has had nothing to do with the actual management of the affairs of the corporation. Kerberger paid for his stock with property and funds of the Trading Company. The other stock was paid for in cash. Immediately upon its organization the Packing Company, by Kirberger as president and general manager, constructed a salmon canning plant at Kake and engaged in the business of packing salmon during the seasons of 1912 and 1913. The venture was unprofitable,

and by the close of the season of 1913 the corporation was practically insolvent, its liabilities exceeding its assets by several thousand dollars. Among its liabilities was an unpaid account due the Trading Company of \$8582.21 for goods, wares and merchandise furnished and money advanced, and \$1750.00 balance on property conveyed to it by the company. Sanborn and Kendall, who seem to have represented the Oregon stockholders, became personally liable for the debts of the Packing Company in a large amount and felt morally obligated to pay the entire indebtedness. They and their associates were dissatisfied with the manner in which the business had been conducted and insisted that some adjustment be made by which either they or Kerberger should retire from the corporation. Kerberger was anxious to continue in control of the company and for that purpose to acquire the stock of his associates. It was thereupon agreed between him and Kendall and Sanborn, on January 6, 1914, that he should assign to them his certificate of stock in the corporation and also the \$8582.21 account of the Trading Company, and receive from them an option for the reassignment of the stock and the purchase by him of the stock belonging to them upon the payment to them of \$65,000.00 within a certain time, in which event they were to pay and discharge the debts and liabilities of the corporation amounting to about \$78,000.00 not including the Trading Company's account which was to be cancelled. The assignment and transfer were made by Kerberger as agreed upon, but he was unable to raise the necessary funds to take up the option, and the transaction was never consummated. His stock was never

transferred on the books of the company and he continued to act as stockholder and director and president until May 11, 1914, when a stockholders' meeting regularly called was held, Kerberger being present and representing 125 shares, at which time a resolution was adopted authorizing and empowering the directors to sell the entire assets of the company to the Sanborn Cutting Company, a corporation in which the defendants Sanborn and Cutting owned all the stock, in consideration that the latter company would assume and pay the liabilities of the Packing Company, less the Trading Company's account, amounting to \$72,621.01 as shown by the books. In pursuance of the authority thus conferred, the directors of the Packing Company conveyed and transferred its assets to the Sanborn Cutting Company, and the latter company assumed and paid the indebtedness of the Packing Company amounting, in fact, to \$81,177.18, excluding the Trading Company's account.

The Trading Company was adjudged a bankrupt on April 8, 1915, and on August 27th following, the plaintiff, as Trustee, recovered judgment against the Packing Company in the District Court of Alaska for \$10,-331.31 with interest at eight per cent per annum from January 31, 1915, being the amount of the account previously assigned by Kerberger to Sanborn and Kendall, and the \$1750.00 heretofore referred to.

Subsequently suit was brought in this court by the Trustee against Kendall, Sanborn, Gordon, the Packing Company and the Sanborn Cutting Company for a decree setting aside the transfer of the assets of the

Packing Company to the Sanborn Cutting Company, and adjudging the plaintiff to be the owner in equity of the 125 shares of stock in the Packing Company subscribed for by Kerberger, and for an accounting, or a judgment against the defendants and each of them for the sum of \$12,500.00, together with the profits accruing to the 125 shares of stock since May 11, 1914.

After the plaintiff recovered judgment against the Packing Company in the District Court of Alaska, he commenced suit therein against the Packing Company and the Sanborn Cutting Company to set aside the transfer by the Packing Company of its assets to Sanborn Cutting Company, on the ground that such transfer was made to hinder, delay and defraud creditors. By stipulation of parties the suit pending in Alaska was deemed to be consolidated with the suit brought in this court, and it was agreed that the issues presented therein should be tried and determined in the present suit, the pleadings being reframed accordingly.

Upon these facts three questions of law arise:

(1) Kerberger having paid for his stock in the Packing Company with the money and property of the Trading Company, does such stock in equity belong to the Trading Company and its Trustee in bankruptcy? This question can be disposed of in the instance case by the statement that the stock was never transferred on the books of the company to Sanborn and Kendall and the purpose for which the certificate therefor was assigned to them failed. It therefore never became their property. They disclaimed at the trial any title or right

thereto and expressed a willingness to assign their interest therein, if any, to the plaintiff. Kerberger is not a party to the suit and hence the court can make no decree as between him and the plaintiff.

(2) Was the assignment of January 6, 1914, by Kerberger to Sanborn and Kendall of the account due from the Packing Company to the Trading Company valid as to the plaintiff? There was no consideration for such transfer moving to the Trading Company. It was not made by the authority of the directors of that company. Kerberger could not use the assets of the corporation for his individual benefit. A corporation has an existence entirely separate and distinct from its shareholders, with power to transact business, invite credit, incur obligations and discharge them entirely distinguished from its individual shareholders and their power to transact business, invite credit, incur obligation and discharge the same. The creditors of a corporation have a claim upon its assets of which they cannot be deprived by an unauthorized act of the officers, although such officers may own all of the stock in the concern. (*Stewart v. Gould*, 36 Pac. 277; *In re Hass Co.*, 131 Fed. 232; *Germania Safety V. & T. Co. v. Boynton*, 71 Fed. 197; 2nd *Thompson on Corporations*, Sec. 1241.)

At the time of the assignment by Kerberger of the account of the Trading Company to Sanborn and Kendall, the Trading Company was practically insolvent, or at least made so by the assignment if valid. The attempted assignment was without authority of the Trading Company and without consideration and was there-

fore void as a matter of law as to the Trustee in bankruptcy, although he may represent only creditors who have become such after the date of the assignment. (*Pacific State Bank v. Coats*, 205 Fed. 618).

(3) Was the transfer by the Packing Company of all its assets to the Sanborn Cutting Company in consideration of the payment by the latter of a portion only of the debts of the Packing Company, which were either due Sanborn and Kendall personally or for which they were liable as guarantors or endorsers, thus in effect preferring them over other creditors of the company, valid, they being at the time stockholders and directors in both companies? The property of a private corporation is not chargeable with any specific lien in favor of general creditors. So long as it is in the active exercise of its functions, if not restrained by charter or by statute, it may exercise as full dominion over its property as an individual may over his. When, however, it becomes insolvent and does not expect to make any further effort to accomplish the object of its creation, it becomes the duty of its officers and managers to distribute its property or proceeds thereof ratably among all the creditors, having regard, of course, to valid liens or charges previously placed upon it. The law will not permit them under such circumstances to obtain any advantage for themselves to the prejudice of other creditors. This doctrine is elaborately stated, fortified by numerous authorities, by Mr. Justice Harlan speaking for the Court of Appeals in *Sutton v. Hutchinson*, 63 Fed. 496, in a case very similar to the one on in hand. (See also *Brown & Co. v. Sanford F. & T. Co.*, 44 Fed. 231; *Lippincott v. Shaw Carriage*,

25 Fed. 577; *Hutchinson v. Sutton Mfg.*, 57 Fed. 998). The transfer by the Packing Company of its assets to the Sanborn Cutting Company was within this rule. The Packing Company was insolvent and intended to cease business. Sanborn and Kendall were stockholders and directors in both the selling and purchasing companies. They therefore could not within the law transfer the property from one company to the other in consideration of the latter's payment of a part only of the indebtedness of the selling company, and especially since such indebtedness was either due largely to them personally, or for which they were liable as endorsers or guarantors.

The transfer, however, was made with no actual intent to hinder, delay or defraud creditors and should not be set aside in toto. The purchasing company will be treated as a trustee of the property for the benefit of creditors and required to account to the plaintiff for his pro rata share of such property. (10 Cyc. 1264-1267). A considerable portion of the property so transferred has been disposed of by the Sanford Cutting Company or used by it in the conduct of its own business. The evidence does not show the amount realized therefor, but its value at the time of the transfer was, I take it from the evidence, about \$60,000.00. The liability of the Packing Company at that time was, including the Trading Company account, in round numbers \$90,000.00. If the property had been applied to the payment of the debts of the Packing Company it would have paid 66-2/3 cents on the dollar.

Plaintiff is therefore entitled to judgment against the Sanborn Cutting Company for \$6688.87, being 66-

2/3 per cent of \$10,333.31, the amount of the indebtedness of the Trading Company, with interest thereon at six per cent per annum from May 12, 1914. The plaintiff is not entitled to recover in this suit for the funds and property of the Trading Company used by Kerberger to pay for the stock in the Packing Company. His claim, if any, on that account has not been reduced to judgment and therefore he has no standing to assert it in a federal court of equity. (*Hollins v. Brierfield C. & I.*, 150 U. S. 371; *Peacock, Hunt & West v. Williams*, 110 Fed. 917).

Decree may be prepared in accordance with this memorandum, neither party to recover costs.

Filed May 1, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Wednesday, the 24th day of May, 1916, the same being the 69th judicial day of the regular March, 1916, term of said Court; present, the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL DECREE.

At the March term of the District Court of the United States for the District of Oregon, held at the United States courtroom in the City of Portland, on the 22nd day of March, in the year of our Lord one thousand nine hundred and sixteen;

Present the Honorable Robert S. Bean, District Judge.

This cause came on to be heard at the March term of the Court in the year of our Lord one thousand nine hundred and sixteen, on the bill of plaintiff, separate answers of the several defendants, and separate replies of plaintiff thereto herein, and, by stipulation and agreement of the respective parties, on the complaint and answer in that certain cause No. 1405-A of the District Court of the District of Alaska, Division No. 1, at Juneau, entitled V. A. Paine as Trustee of the estate of the Kake Trading & Packing Company, a corporation, bankrupt, plaintiff, v. Kake Packing Company, a corporation, and Sanborn-Cutting Co., a corporation, defendants, which said cause was by said stipulation and agreement consolidated herewith and the issues thereof submitted herein for determination, and was argued by counsel;

And it appearing that the bill in equity in the above entitled cause was filed in this court on the 6th day of December, 1915, and that a subpoena was issued and duly served on the defendants F. P. Kendall, S. S. Gordon, George W. Sanborn, Kake Packing Company, a corporation, and Sanborn-Cutting Co., a corporation; and that no appearance has been entered on the part of the said defendant Kake Packing Company, a corporation, on demurrer or plea, or answer filed;

And it appearing that the said complaint in said cause No. 1405-A of the District Court for the District of Alaska, Division No. 1, at Juneau, was filed in said

court on the 6th day of December, 1915, and that summons was issued and duly served on the said defendants Kake Packing Company, a corporation, and Sanborn-Cutting Co., a corporation, and that no appearance has been entered on the part of the said defendant Kake Packing Company, a corporation, on demurrer or plea, or answer filed;

And the Court after argument of counsel having taken said two suits as thus consolidated under advisement until the 17th day of April, 1916, at which time it rendered herein its memorandum opinion;

NOW THEREFORE, upon consideration of the said bill in equity, the separate answers thereto of the defendants, and the separate replies of the plaintiff to said separate answers, in this cause, and the said complaint of plaintiff and the said answer of the defendant Sanborn-Cutting Co., a corporation, in said cause No. 1405-A of the District Court for the District of Alaska, Division No. 1, and the said proofs, it is by the Court, upon consideration thereof,

ORDERED, ADJUDGED AND DECREED that the assignment by Ernest Kirberger to the defendants F. P. Kendall and George W. Sanborn of the account of \$8,582.21 due the Kake Trading & Packing Company, a corporation, from the defendant Kake Packing Company, a corporation, be, and the same is hereby declared null and void, and the said assignment should be and the same is hereby set aside and held for naught.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Sanborn-Cutting Co., a corporation, did receive the assets and property transferred to it by the defendant Kake Packing Company, a corporation, subject to the indebtedness amounting to \$10,333.31 owing by said defendant Kake Packing Company, a corporation, to said Kake Trading & Packing Company, a corporation, and did receive said assets and property as Trustee for the benefit of the creditors of the said defendant Kake Packing Company, a corporation, and that plaintiff as Trustee in Bankruptcy succeeded to the rights of the Kake Trading & Packing Company, a corporation, as a creditor of said defendant Kake Packing Company, a corporation, and is entitled to a pro rata share of such property and assets.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover from the defendant Sanborn-Cutting Co., a corporation, and the sum of \$6,688.87 together with interest thereon at the rate of six per cent per annum from May 12, 1914, and that the plaintiff do have and recover from the defendant Sanborn-Cutting Co., a corporation, his costs of suit herein, to be taxed, and that execution issue herein for said \$6,688.87, together with interest and costs.

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this suit be dismissed as to the defendant S. S. Gordon, F. P. Kendall

and G. W. Sanborn, and that they have his costs herein to be taxed.

Done in open court at Portland, Oregon, this 24th day of May, A. D. 1916.

R. S. BEAN,
District Judge.

State of Oregon,
County of Multnomah,—ss.

I, James J. Crossley, being first duly sworn, depose and say that I am one of the counsel for plaintiff herein; that neither of the attorneys for defendants are present in the city of Portland, Multnomah County, Oregon, so personal service of a copy hereof can be made upon them, and I have therefore made service of a copy of the within decree by mailing on this date in the United States Postoffice at Portland, Oregon, a copy of the same, addressed to G. C. Fulton, one of the defendants' attorneys, at Astoria, Oregon.

JAMES J. CROSSLEY.

Subscribed and sworn to before me on this 20th day of May, A. D., 1916.

J. N. HART,
(Seal) Notary Public for Oregon.

My commission expires Aug. 1, 1916.

Filed May 24, 1916.

G. H. MARSH, Clerk.

PETITION FOR APPEAL.

And afterwards, to wit, on the 25th day of July, 1916, there was duly filed in said Court and cause, a Petition of Sanborn-Cutting Company for an Appeal, and Order allowing Appeal, in words and figures as follows, to wit:

TO THE HONORABLE CHARLES E. WOLVERTON and ROBERT S. BEAN, Judges of the above entitled court:

Your petitioner, Sanborn-Cutting Co., one of the defendants in the above entitled cause, conceiving itself aggrieved by the judgment and decree rendered and entered in the above entitled court in the above entitled cause, on the 24th day of May, A. D. 1916, and believing that said decree and judgment is greatly to its prejudice and is erroneous and inequitable, does hereby appeal from said judgment and decree, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignments of error which is filed herein, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

G. C. & A. C. FULTON,

Attorneys for Defendant Sanborn-Cutting Co.

ORDER ALLOWING APPEAL.

The foregoing petition for appeal is hereby granted and allowed, and the claim of appeal therein made is hereby allowed, in open court, and the amount of the bond on said appeal to supercede and stay proceedings on said judgment and decree appealed from is hereby fixed at the sum of \$7500.00.

Dated this 25th day of July, A. D. 1916.

R. S. BEAN,
District Judge.

Filed July 25, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 25th day of July, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

The defendant Sanborn-Cutting Co. makes the following Assignments of Error, which it avers occurred at the trial of the above entitled cause, and prays for reversal of the decree in the above entitled Court in said cause, and for a decree and judgment as prayed for in its separate answer filed herein:

I.

The Court erred in holding and adjudging and in entering a decree that the assignment by Ernest Kirber-

ger to the defendants F. P. Kendall and George W. Sanborn of the account of \$8582.21 due the Kake Trading & Packing Co., a corporation, from the defendant Kake Packing Co., a corporation, was null and void, and in adjudging and entering a decree setting aside such assignment, and in holding the same for naught.

II.

The Court erred in holding and adjudging and in entering a decree that the defendant Sanborn-Cutting Co. did receive the assets and property transferred to it by the Kake Packing Co., a corporation, subject to the indebtedness of said Kake Packing Co., amounting to \$10,333.31, owing by said Kake Packing Co. to the Kake Trading & Packing Co., and in adjudging and decreeing that the defendant Sanborn-Cutting Co. received said assets and property as trustee for the benefit of the creditors of the defendant Kake Packing Co., and in adjudging and decreeing that plaintiff, as Trustee in bankruptcy, succeeded to the rights of the Kake Trading & Packing Co., a corporation, as creditor of said Kake Packing Co., and in adjudging and decreeing that plaintiff is entitled to a pro rata share, or any share, of such property and assets, and in adjudging and decreeing that plaintiff was entitled to any part or portion thereof, and in holding, adjudging and decreeing that the defendant Sanborn-Cutting Co. received such assets for the use and benefit of the plaintiff, or any person whomsoever.

III.

The Court erred in holding and adjudging that the plaintiff was entitled to recover from the defendant Sanborn-Cutting Co. the sum of \$6688.87, together with interest thereon at the rate of 6% per annum from May 12, 1914, and entering a decree to that effect, and in further adjudging and decreeing that plaintiff have and recover from the defendant Sanborn-Cutting Co. its costs and disbursements of such suit.

IV.

The Court erred in entering judgment and decree against the defendant Sanborn-Cutting Co. in the sum of \$6688.87, or any sum or amount whatever.

V.

The Court erred in entering judgment against the defendant Sanborn-Cutting Co. for interest on the sum of \$6688.87 from May 12, 1914, or from any date whatever, or any interest whatever.

VI.

The Court erred in failing, refusing to, and in not holding, adjudging and decreeing that the transfer and assignment of the assets of the Kake Packing Co. to the defendant Sanborn-Cutting Co. was lawful and was in good faith, and was for a valuable consideration, and that the plaintiff had no interest therein or thereto, and that such transfer and assignment vested in the defend-

ant Sanborn-Cutting Co. the title to said property, and divested the plaintiff of all claim, trust, or interest therein.

VII.

The Court erred in failing, refusing to, and in not holding, adjudging and decreeing that the plaintiff was estopped from contending, alleging or claiming that he, as trustee, was entitled to question or set aside the assignment and transfer of the Kake Packing Co. to defendant Sanborn-Cutting Co.

VIII.

The Court erred in failing, refusing to, and in not holding that the acts of Ernest Kirberger, owner of all of the stock of the Kake Packing Co., were the acts and deeds of the Kake Packing Co., and binding upon such company.

IX.

The Court erred in holding, adjudging and decreeing that plaintiff was entitled to recover any judgment or decree in this case.

X.

The Court erred in not holding, adjudging, and in not entering a decree to the effect that the sale and transfer of the assets of the Kake Packing Co. to the defendant Sanborn-Cutting Co. was free from fraud, and was fairly and honestly made, and made for a valuable consideration, and that the said Sanborn-Cutting Co. is and

was, since May 12, 1914, the owner of the whole thereof, and in not adjudging and decreeing that the plaintiff herein never at any time had any right, title, interest or estate therein or thereto, and in enjoining and restraining plaintiff from claiming to own any right, title, interest or estate of, in or to, or lien upon, or right to participate in, the assets of the Kake Packing Co., which were on May 12, 1914, assigned and conveyed to this defendant, Sanborn-Cutting Co.

XI.

The Court erred in not entering a decree in favor of defendant Sanborn-Cutting Co. and against the plaintiff.

XII.

The Court erred in admitting in evidence over the objection of the defendant Sanborn-Cutting Co., and in not excluding from the evidence Plaintiff's Exhibit "67a," being statement of the liabilities of the Kake Trading & Packing Co.

XIII.

The Court erred in not sustaining, and in overruling and denying, the motion of the defendant Sanborn-Cutting Co. to strike out all of Plaintiff's Exhibits "R," "S," "T," "U," "V," "W," "X," "Y," "Z," "AA," "BB," "CC," "DD," "EE," "FF," "GG," and "HH," and in receiving the same in evidence in said cause.

WHEREFORE, defendant prays that the judgment and decree herein described and complained of be

reversed, and that the said Court be directed to enter a decree as prayed for in the answer of defendant Sanborn-Cutting Co.

G. C. & A. C. FULTON,
Attorneys for Defendant Sanborn-Cutting Co.

Filed July 25, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 25th day of July, 1916, there was duly filed in said Court and cause, a Supersedeas Bond, in words and figures as follows, to wit:

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, Sanborn-Cutting Co., a corporation, as principal, and the UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation duly organized and licensed to execute surety bonds in the State of Oregon, and all surety bonds required in any action or proceedings in the United States District Court for the District of Oregon, as surety, are held and firmly bound unto V. A. Paine, as Trustee of the Kake Trading & Packing Company, a corporation, bankrupt, in the full and just sum of Seven Thousand Five Hundred Dollars (\$7500.00) to be paid to V. A. Paine, as trustee aforesaid, and his certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally by these presents.

Sealed with our seals, and dated this 25th day of July, A. D. 1916.

WHEREAS, lately at the District Court of the United States for the District of Oregon, in a suit pending in said Court between V. A. Paine, as Trustee of the Kake Trading and Packing Company, a corporation, bankrupt, plaintiff, and F. P. Kendall, George W. Sanborn, S. S. Gordon, Kake Packing Company, a corporation, and Sanborn Cutting Company, a corporation, defendants, a decree was rendered against the defendant Sanborn-Cutting Co., and the said defendant Sanborn-Cutting Co. having obtained an appeal, and having appealed therefrom to the United States Circuit Court of Appeals, for the Ninth Circuit, and said appeal having been allowed to reverse the decree in the aforesaid suit, and a citation having been issued directed to said V. A. Paine, as Trustee of the Kake Trading & Packing Company, a corporation, bankrupt, citing and admonishing him to be and appear in said United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of said citation.

NOW, the condition of the above obligation is such, that if the said defendant Sanborn-Cutting Co. shall prosecute its appeal to effect and answer all damages and costs, and if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

WITNESS our hands and seals this 25th day of
July, A. D. 1916.

SANBORN-CUTTING CO.,
(SEAL)

By Geo. W. Sanborn,
Its President.

UNITED STATES FIDELITY & GUARANTY
COMPANY, (SEAL)

By Douglas R. Tate,
Its Attorney in Fact.

Approved and proceedings stayed July 25, 1916.

R. S. BEAN, Judge.

Filed July 25, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 20th day of September,
1916, there was duly filed in said Court and cause,
a Statement of the Evidence in words and figures
as follows, to wit:

STATEMENT OF THE EVIDENCE.

ENGROSSED TESTIMONY AND EVIDENCE.

BE IT REMEMBERED, that after the above en-
titled cause was fully at issue, the same was duly tried
before the Court in open Court, beginning March 22,
1916, and continuing until completed. The plaintiff ap-
peared in person and by his attorneys, Gunnison & Rob-
ertson and James J. Crossley, and the defendants in per-
son and by their attorneys, G. C. & A. C. Fulton.

Thereupon, the following testimony and evidence was duly taken and had before said Court, that is to say:

The plaintiff, in order to sustain the issues on his part, produced the following testimony and evidence:

ERNEST KIRBERGER.

Ernest Kirberger was then called as a witness on behalf of plaintiff, who, after being first duly sworn, according to law, testified as follows:

My name is Ernest Kirberger; my residence is in Kake, Alaska; I have resided there for about 15 years last past. Kake is situated on Kupreanof Island, in the First Division of Alaska, about 120 miles south of Juneau. It is purely an Indian village of about 350 population, containing about a half dozen white families, and has been such for the last 15 years. I am thirty-eight years of age. I must have been about twenty-three when I first went to Alaska. Before going to Kake, I had been operating some coal lands in that vicinity, and had been so engaged for about two years, as manager of a prospecting expedition. Before that, I had just come out of school. The first occupation that I had when I came to Kake was working for Mr. F. C. Sepp, who was engaged in the mercantile and fishing business and in shipping halibut. I was working for him in the capacity of a clerk, and continued there for about two years, when I became interested with Mr. Sepp there with the idea of establishing a cannery. I thing this was about 1903. The result was I went East to see some of my relatives with the idea of engaging in the canning

business, but was unable to raise any money—in fact, abandoned the idea at that time. At that time, Mr. Sepp owned the store business and fishery site and the property at Point Barrie. He had taken possession of the property, and made the proper location.

The following stipulation was entered into between counsel for plaintiffs and defendants, to-wit:

MR. FULTON: I will admit in this case that on the 9th day of April, 1915, the Kake Trading & Packing Company filed its petition to be adjudged a bankrupt in the United States District Court for the Territory of Alaska, sitting at Juneau, and, on that date, in accordance with the provisions of the Act of Congress relating to bankrupts, the Kake Trading & Packing Company was adjudged a bankrupt, and that, pursuant to due and legal proceedings had before that Court, the plaintiff in this suit was duly appointed Trustee in Bankruptcy of the estate of such bankrupt, and that he duly qualified as such, and entered upon the discharge of his duties, and is now the duly acting and qualified Trustee of the Kake Trading & Packing Company, bankrupt.

Thereupon, counsel for plaintiff made the following offer:

I now offer in evidence, if the Court please, a certified copy of the appointment, oath and report of appraiser and inventory to show that the assets in hand are not equal to the liabilities of the Kake Trading & Packing Company, and, in that connection, I will offer a list of the claims which have been allowed in that matter.

The same were received in evidence and are hereunto attached and marked Plaintiffs Exhibit "1," and made a part hereof.

Counsel for plaintiff also made the following offer:

We also offer in evidence a certified copy of such claims allowed up to the 13th day of March, of this year, in that matter.

The same were received in evidence and read in evidence, and are hereunto attached, marked Plaintiff's Exhibit "2."

Thereupon, it was agreed between the parties that the Kake Packing Company is a corporation as alleged; that the Kake Trading & Packing Company is a corporation as alleged, and that the Sanborn-Cutting Co. is a corporation as alleged.

Q. Do you know whether or not Mr. Sepp during that time took any occasion to perfect his title to that ground in any way?

A. Yes, he made location notice.

Q. Filed location notice?

A. Filed location notice.

Q. Look at this paper which I hand you, Mr. Kirberger, and see if you recognize it.

Thereupon, counsel for plaintiff handed witness a paper.

The witness testified that he recognized the document, and that the signature attached thereto was the genuine signature of Mr. Sepp.

Thereupon, counsel for plaintiff offered said document in evidence, and the same was received in evidence, and marked Plaintiff's Exhibit "3," and the same is hereunto attached so marked.

Thereupon this witness was handed a paper and witness testified that it was the original.

Thereupon counsel for plaintiff made the following offer:

I will offer in evidence the original notice of location of Fred C. Sepp, taking up certain property about one mile south of Point Barrie on the southwestern shore of Kupreanof Island, District of Alaska.

The same was received and read in evidence and marked Plaintiff's Exhibit "4," and is hereunto attached so marked.

Witness was then handed a document and after identifying the same testified that he was acquainted with the signature; that it was the signature of Mr. Orr.

Counsel for plaintiff made the following offer:

We will offer in evidence a quit claim deed from Cyrus Orr to Fred C. Sepp, of date December 11, 1901, concerning certain property situate at Point Barrie, Kupreanof Island, Alaska.

The same was received and read in evidence and marked Plaintiff's Exhibit "5," and the same is hereunto attached so marked.

Continuing said witness testified as follows:

Preparatory to my trip east in relation to raising funds for the proposed cannery, I made out a prospectus that year, 1903, and went East with it. I have that prospectus with me now. I was back east a year, assisting my brother in a general way, but was working on this proposition all the time, about a year-and-a-half. After that I figured with Mr. Sepp and Mr. Burrell of the Seattle Hardware Company, about organizing a company in a small way, I to take a one-quarter interest. We then proceeded to Seattle and organized the Kake Trading and Packing Company, capitalized at \$25,000.00, under the laws of the State of Washington. E. B. Burwell, S. H. Morford and F. C. Sepp assisted me in the incorporation of the concern. It was incorporated in the year 1904. I took a quarter interest in the corporation. We thereupon engaged in the business of salting salmon and mild curing salmon, also in the mercantile business, together with furs, at Kake. The property which the Kake Trading & Packing Company used was situated about a mile and an eighth from Kake.

“Q. Referring to this location notice (plaintiff’s Exhibit 6), do you recall whether there had been any conveyances in the meantime from Mr. Sepp of this property? A. Yes, sir, I do. Q. Look at the signature and see if that is the original. A. Yes, sir, it is.

Thereupon counsel for plaintiff made the following offer:

I will offer in evidence at this time, if the court please, quitclaim deed from Fred C. Sepp to E. B. Burwell, dated December 12, 1901, to a certain piece or parcel of land situate about one mile southeast of Kake Village on the northwestern shore of Kupreanof Island, which is in Alaska, also to a certain piece or parcel of land situate about one mile north of Point Barrie on the southwestern shore of Kupreanof Island, without describing it by metes and bounds.

The document was received and read in evidence, marked Plaintiff's Exhibit "6" and is hereunto attached, so marked.

Thereupon counsel for plaintiff after properly identifying the document hereafter referred to, made the following offer:

I offer in evidence at this time a bill of sale from Fred C. Sepp to E. B. Burwell, conveying certain described buildings, goods, chattels and effects, being described as 150,000 feet of building lumber, 100,000 cedar shingles, the store building and all the stock of goods, wares, merchandise and fixtures in and about the store building heretofore occupied by said Fred C. Sepp at Kake Village, Alaska; also salt house, cooper shop, store building, dwelling, log cabin, boat house, scow with certain paraphernalia; also one cannery site foundation near Point Ellis Kuiu Island, Alaska.

The same was received and read in evidence and is hereunto attached, marked Plaintiff's Exhibit "7" and made a part hereof.

After the organization of the Kake Trading & Packing Company it used the cannery site which we used as a salting building and which was located under the Traders and Manufacturers' right, and which we afterwards were trying to get a patent on, and which we did get a patent on.

The witness thereupon produced the deed and the same was offered in evidence on behalf of plaintiff, and the same was duly received in evidence, and the same is hereunto attached, marked Plaintiff's Exhibit "8" and made a part hereof.

The property described in this deed does not cover the Point Barrie site.

After the Kake Trading & Packing Company was organized, I was working under Mr. Sepp as clerk, about two years, until he was drowned. This occurred along in 1906. "Q. What was the business of the Kake Trading & Packing Company during that time? A. We were salting salmon, mild curing salmon, shipping halibut. Q. What other business? A. And the mercantile business, together with furs. Q. What was the chief business of that concern? A. I would imagine you would consider it a mercantile business." After that I became general manager of the concern, and I continued as such general manager until the year 1912, during which time I spent the greater portion of my time at Kake, Alaska, and during that time I was not engaged in any business enterprise at any other place, excepting, of course, the short time I was East with my brother in Pennsylvania. During the years 1908, 1909, 1910 and

1911, we had the buildings of the Kake Trading & Packing Company leased to the Vansyssel Packing Company for the purpose of mild curing salmon. During all this time, I was working on the proposition of building a cannery. I continued to work on the proposition during the years 1910 and 1911, but nothing came of it. In the meantime, we had perfected title to the land of the Kake Trading & Packing Company, and had it patented under the Traders' & Manufacturers' right, but did not get a patent at that time.

Counsel for plaintiff then offered in evidence patent from the United States to the Kake Trading & Packing Company for lands embraced in United States Survey No. 963 situate on the west shore of Kupreanof Island.

The same was received and read in evidence and is hereunto attached and marked Plaintiff's Exhibit "9." This is the land that was conveyed to the Kake Trading & Packing Company. Plaintiff's Exhibit 9 covers lands that were conveyed by the Kake Trading & Packing Company to the Kake Packing Company.

During the year 1910, I made out a prospectus of the proposed cannery business and that is it.

Here witness produced a document. This document was offered and received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "10."

Thereupon counsel for plaintiff made the following offer:

We will offer in evidence at this time a letter dated Seattle, Washington, October 12, 1910, to Mr. Fred

Morck, Warren, Pa., from Ernest Kirberger, the witness.

Thereupon said witness was interrogated by Mr. Fulton as follows:

Q. That is a copy of a letter you sent?

A. Yes, sir.

Q. It is not the original?

A. No, sir.

Q. Where has this been all this time?

A. At Kake.

Q. Did you ever show it to the Sanborn Cutting Company, or Kendall, or anybody?

A. I don't think so.

Thereupon counsel for defendants objected to said document, upon the ground that the same was irrelevant and incompetent and a self-serving document.

THE COURT: I don't think it is competent for any purpose in this case. I don't think these matters of private correspondence with other parties can have any bearing upon the merits of this case unless they can connect the defendants. You can put it in the record and can argue that later.

Thereupon, the same was received and read in evidence, and the same is hereunto attached, marked Plaintiff's Exhibit "11," and made a part hereof.

Q. Will you look at that and state if that is a true and correct copy of the original. Counsel for plaintiff handed witness a writing.

A. It is.

Q. And was the original sent to the addressee there given?

A. Yes, sir.

Q. And who was that letter sent to?

A. Fred Morck, at Warren, Pennsylvania.

Q. Who wrote that letter?

A. I did.

Q. And on the date there shown?

A. The date, yes, sir.

Thereupon, counsel for plaintiff offered said writing in evidence.

MR. FULTON: This copy of letter you wrote, did you ever show it to Sanborn, or Kendall, or Gordon?

A. I don't think so.

Thereupon, defendants, through their attorneys, objected to the introduction of said writing in evidence, or the receiving of the same in evidence, upon the ground that the same was irrelevant, incompetent and immaterial, but the same, however, was received and read in evidence over the objection of counsel for defendants, and an exception was allowed, and the same is hereunto attached, marked Plaintiff's Exhibit "12," and made a part hereof.

Witness was then handed a letter by counsel for plaintiff and interrogated thereon as follows:

Q. Will you look at that, Mr. Kirberger, and see whether or not you recognize it?

A. Yes.

Q. And do you know what became of the original of that?

A. Mailed it to Mr. Morck at Warren, Pennsylvania.

Q. Was that a true copy of it?

A. Yes, sir; it is.

Q. Who was it written to?

A. Mr. Fred Morck, Warren, Pennsylvania.

Q. It was dated what?

A. April 25th, 1911, and written by myself.

Thereupon counsel for plaintiff offered said letter in evidence.

The defendants, by their counsel, interpose the same objection as last interposed.

The same was received in evidence and is hereunto attached marked Plaintiff's Exhibit "13" and made a part hereof.

"Now, Mr. Kirberger, will you state over what period of time it was that you were endeavoring to get this cannery organized and writing these various letters?

A. 1910, '11 and '12."

In February, 1912, I contemplated getting the people from the East interested—in 1912—the people I had arranged with to go in with me, from the East, and I was looking up machinery, supplies, etc., at different places around Puget Sound, and finally I figured on going to Portland to look up machinery there, and I was anxious to look over the new sanitary can making

machinery, because that was just coming into the field at that time, and I was recommended to interview Mr. F. P. Kendall, of the American Can Company. Mr. Kendall wired me to come to Portland and to look over the machinery. This is the telegram I received from him. By agreement the same was read into the record as Plaintiff's Exhibit 14.

Portland, Ore., January 31, 1912.

Ernest Kirberger,
Hotel Frye, Seattle, Wash.

Impossible to be Seattle this week. Suggest you come to Portland, when we can show you machines in operation and explain fully details of same. Answer.

F. P. KENDALL.

THE COURT: You had some communication with Mr. Kendall prior to that message, I suppose?

A. Only by wire, Judge.

THE COURT: Had you had some communication with him prior to that time of some kind?

A. I don't think I had only through telegram. That is all; not by letter, though.

I came over to Portland in response to that telegram, and met Mr. Kendall, of the American Can Company, at his office in Portland. Mr. Kendall showed me the different lines of machinery first, and I got into conversation with Mr. Kendall over the different possibilities of the canning business, and I explained to him that I was planning to get a cannery located up at our

place there, and I had been working on it, and that I had people in the East that were figuring on going in with me, and my property, etc. And we got to talking over the situation and it appealed to Mr. Kendall in a good many ways, and he stated that perhaps he would like to join with other people, and perhaps have some of his friends join us, and he suggested that I meet with Mr. Sanborn, who would be glad to show me the working of the sanitary machinery at Astoria in their plant there, which he did do. Mr. Sanborn came up and we all met together in Mr. Kendall's office, and talked the proposition over. Mr. Kendall was representing at that time the American Can Company. I came to see him relative to machinery for my cans. Mr. Kendall did not go to Astoria with me. I went with Mr. Sanborn to Astoria. Mr. Sanborn came to Portland, and I afterwards visited Astoria, and I brought with me my prospectus and showed it to Messrs. Kendall and Sanborn. They stated that the prospectus was all right, but it didn't appeal to them from the fact that there was a great deal in the prospectus that they were not interested in. The prospectus that I showed to Messrs. Kendall and Sanborn is Plaintiff's Exhibit "10." These gentlemen looked over this prospectus, and Mr. Sanborn said that if I and the other people were willing to put in dollar for dollar, he was willing to go in too, and they eliminated a majority of the things, and a great many things that wasn't necessary in the shape of a proposition for a canning plant, on account of certain real estate, like cabins and dwellings and store business that they were not interested in, and that was eliminated.

This proposition, however, came up at Astoria, and Mr. Sanborn and I looked over and formulated the proposition ourselves, and got it in shape, so that the other gentlemen would be willing to take an interest in it. Mr. Sanborn said that the building and land and the equipment that remained there, including the dock and scow and launches and barrels, and general equipment around a salting establishment could possibly be used, and they ultimately decided on taking over that amount. We placed a valuation on the property of \$7,500.00, and then it was increased to \$8,500.00.

I met Mr. Gordon at Astoria at that time. I was introduced to him by Messrs. Sanborn and Kendall. I think Mr. Kendall had talked over the proposition with him, and asked him if he would care to join them. We ultimately, all three, decided to organize the cannery under the name of Kake Packing Co., and we did organize such corporation at that time, with a capital stock of \$50,000.00, divided into 500 shares, at \$100.00 a share.

I subscribed for 125 shares. The property that the Kake Trading & Packing Company was to convey to the Kake Packing Co. was valued at \$8,500.00. That would be 85 shares. I was to pay for my 40 shares in cash. I expected to get this money from my sister at home. I also subscribed for 60 shares of stock for my brother, A. C. Kirberger. I held a power of attorney from him for that purpose.

After the corporation was organized, we held an election of officers, and then I went up to Kake, and we

started to build a cannery. The officers elected at that meeting of the Kake Packing Co. were myself, as President, Mr. Sanborn, Secretary, and Mr. Gordon, Treasurer, and Mr. Burwell, Vice-President. I was also appointed General Manager. We thereupon went ahead and built a cannery at Kake, Alaska. After we had organized the Kake Packing Co., I went back to Seattle where we held a meeting of the Board of Trustees of the Kake Trading & Packing Company.

This is the original minute book of the Kake Trading & Packing Company. I recognize the signatures there. They are the signatures of myself, President, and Mr. Seth H. Morford, as Secretary. I refer to the meeting of February 29, 1912.

Thereupon, counsel for plaintiff offered in evidence the record of the minutes of the meeting of February 29, 1912, as follows (Plaintiff's Exhibit 15):

"A meeting of the trustees of the Kake Trading & Packing Company was held in Seattle, on February 29th, 1912, with the following trustees present: Ernest Kirberger, E. B. Burwell, Seth H. Morford.

On motion the President and Secretary were instructed to execute to the Kake Packing Company a bill of sale of the following personal property, to-wit: 2 scows, 1 launch 'Eagle,' 30 gasoline tanks, round fish tanks, 1 boiler, 1 engine.

And also to execute a warranty deed to the Kake Packing Company for 15 9/10 acres and

buildings situate thereon, located near Kake Village, owned by us, the same to be paid for in stock of the Kake Packing Company to the amount of \$7,500.

There being no further business the meeting adjourned.

ERNEST KIRBERGER,

President.

SETH H. MORFORD,

Secretary."

In accordance with the above resolution, the Kake Trading & Packing Company executed a bill of sale and deed as therein directed.

It was then stipulated between counsel for plaintiff and defendants that the bill of sale and deed, as directed by said minutes, were properly executed and delivered.

WITNESS CONTINUING: During this time, the Kake Trading & Packing Company was engaged in operating a general merchandising establishment, and during the operation of the cannery of the Kake Packing Co., the Kake Packing Co. purchased supplies from the Kake Trading & Packing Company, but the Kake Packing Co. did not pay such indebtedness as incurred.

By the first day of July, 1912, as I recall it, the Kake Packing Co. was indebted to the Kake Trading & Packing Company in the sum of over \$4,000.00.

I think defendant Kendall came to Kake sometime during the month of May, 1912.

Sometime during the month of June, 1912, the Kake Packing Co. paid the Kake Trading & Packing Co.

\$8,500.00 for a transfer to it of the property set forth in the minutes of the meeting of the Kake Trading & Packing Co. of date February 29, 1912. This payment was made in the form of a check. Upon receipt of the check, I immediately sent it back to the Kake Packing Co. at its office at Astoria, Oregon.

Later, the \$4,000.00 above mentioned was paid by check of the Kake Packing Co. This check, I sent back to the Kake Packing Co. again and endorsed it and turned it over to them. I did this in order to pay for the stock subscription for my own individual stock subscription.

THE COURT: In other words, you took the money of the Kake Trading Company, and applied it on your individual debt to the Packing Company, for stock you subscribed?

A. Well, the stock that I subscribed was for the Kake Trading & Packing Company, and I paid for this four thousand dollars that I subscribed originally.

Q. And you sent the money back? The amount of the two checks you sent back to the Kake Packing Company?

A. Yes, sir.

Q. To pay for 125 shares of stock?

A. Yes, sir.

Q. Eighty-five shares of that hundred and twenty-five was the eighty-five which was to be given for the conveyance, was it

A. For the property, yes, sir.

Q. And the forty shares were shares that you subscribed for yourself?

A. Yes, sir.

Q. And for which you expected to get money from your sister to pay?

A. Yes, sir.

THE COURT: I don't understand. Now counsel just said that this property was transferred to the Packing Company—transferred by the Trading Company to the Packing Company in consideration of this \$8,500.00 stock. Is that right?

MR. ROBERTSON: No, \$8,500.00 cash, and that \$8,500.00 was used to buy eighty-five shares of stock. It had been authorized by this resolution, which I read to your Honor, of the Trustees of the Kake Trading & Packing Company. They authorized the conveyance for that number of shares.

THE COURT: That resolution authorized the transfer of certain property to this Packing Company in consideration that the Packing Company issue to the Trading Company \$8,500.00 in stock. Isn't that right? That was not done, was it?

MR. ROBERTSON: Yes, sir, they did. The Kake Trading & Packing Company did issue to the Kake Packing Company its bill of sale and warranty deed—well, I wouldn't say warranty deed, but a deed, and then they sent up their \$8,500.00 check to pay for the property, and they sent it to the Packing Company to pay for the stock; sent it right back down, as I understand, Mr. Kirberger.

MR. FULTON: I don't understand it, but your Honor wasn't asking me.

Q. Was that the idea, Mr. Kirberger? Just explain these transactions.

A. The idea was that the money had to be paid into the bank—

THE COURT: I don't understand why the company is paying \$8,500.00 for stock in money; payment money, \$8,500.00, for the stock when it is already paid for in property.

MR. FULTON: It is alleged in the complaint here, as I understand it, that the Packing Company paid the Trading Company cash \$8,500.00 for the property. The Kake Packing Company paid the Trading Company \$8,500.00 cash.

THE COURT: That is what he testified.

MR. FULTON: But your Honor can see between the lines what became of it. We knew nothing about this of course. He was authorized by the Kake Trading & Packing Company to sell it for \$7,500.00, and he sold it for \$8,500.00. I think he is a pretty good business man myself.

THE COURT: We are not concerned about that just now, but I would like to understand the other.

Q. Mr. Kirberger, let's get that clear. Now, at the time of the meeting in Astoria with Mr. Kendall and Mr. Sanborn, there was an agreement made by which certain properties shown on this prospectus belonging to the Kake Trading & Packing Company were to be taken into the Kake Packing Company for \$8,500.00. Is that correct?

A. Yes.

THE COURT: He has testified already. I just want to understand what he meant. Go ahead; explain the transaction of this \$8,500.00 and the checks.

A. In making these conveyances here for that consideration there, the idea, as I understand it, was that before the cannery could start to borrow money at the bank, a certain amount had to be paid in—before they could start to borrow any money. And in order to make the transaction complete, they just simply sent a check to cover for the land, the same as if I had taken the money and bought stock with it. And in regard to the four thousand dollars that was the same proposition. The cannery incurred this indebtedness at just about the same time the stock subscription was due, and Mr. Kendall suggested it would be just as broad as long; they would send a check to cover the store account, and I could endorse the check over to the cannery then to pay for my stock.

THE COURT: You were paying for your private stock, is that the idea?

A. Paying for my private stock?

THE COURT: Yes.

A. The same as the other part, the Kake Trading & Packing Company.

THE COURT: When the Packing Company was organized, you subscribed for 125 shares of stock in your own name, did you?

A. Yes, sir.

THE COURT: And you paid for that with checks that were issued to the Trading Company?

A. Yes, sir.

This is the check for \$8,500.00 that I have just spoken of.

Thereupon counsel for plaintiff offered said check in evidence and the same was duly received and read in evidence and is hereunto attached, marked Plaintiff's Exhibit "16," and made a part hereof.

THE COURT: It is simply important as showing that the money of the Trading Company went to pay for the stock subscribed by this witness in his individual name. Shows the Trading Company has some equitable claim on that stock.

MR. CROSSLEY: Our contention is he held it in trust.

THE COURT: He did not subscribe for it that way, and endorsed it as though paid for, so it doesn't make any difference whether he had it in trust or personally. If paid for by the money of the Trading Company, it is entitled to this stock.

MR. FULTON: So far as the question in this case is concerned, we are not disposed to dispute that question at all.

Thereupon the said witness read into the record the endorsement on said Plaintiff's Exhibit "16" as follows: "Pay to order S. S. Gordon, Treasurer, in payment of my stock in the Kake Packing Company." Signed Ernest Kirberger.

The handwriting is Mr. Sanborn's. The signature is mine. That is Mr. Gordon's signature.

Defendant's counsel then admitted that the writing "Pay to order S. S. Gordon, Treasurer, in payment of my stock in the Kake Packing Company" is in Mr. Sanborn's handwriting.

I signed this check in Alaska and at that time Mr. Sanborn was in Astoria. This (here witness produced a document) is the \$4,000.00 check that I have referred to. The endorsement on the back of this check was written on it before it was received by me. It is in the handwriting of Mr. G. W. Sanborn. The only writing of mine on the back of that check is my signature. The endorsement "Pay to order S. S. Gordon, Treasurer, in payment of my stock in the Kake Packing Co." is in the handwriting of Mr. G. W. Sanborn. That is Mr. Gordon's signature at the bottom.

Thereupon counsel for plaintiff offered said writing with endorsement thereon in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "17," and made a part hereof.

WITNESS CONTINUING: The bill of sale and deed from the Kake Trading & Packing Company to the Kake Packing Company was made before the receipt of the \$8,500.00 check above mentioned, but the company never received payment until it got the \$8,500.00 check, and the Kake Trading & Packing Company never paid for its 85 shares of stock until that check was received. The resolution authorizing the execution of the deed and bill of sale provides that the consideration should be \$7,500.00. The Kake Trading & Pack-

ing Company actually received \$8,500.00. That is explained right on that voucher there—that voucher accompanying that check, the whole thing. This is how it occurred: Mr. Sanborn had agreed on the price of the land but increased it for the reason that he thought the price of the land was very inadequate for fifteen acres of land; the price offered originally was very inadequate, and he agreed with Mr. Gordon to allow that extra there and make it \$8,500.00. You can see where that difference comes in there, of that \$8,500.00 compared with \$7,500.00; explained in the bill of sale. Prices all extended and you can see the whole thing, and Mr. Sanborn agreed to increase that \$200 or \$300 on account of the inadequate consideration for the land. That is how that came. After the payment of this \$4,000.00 the Kake Packing Company continued to purchase goods from the Kake Trading & Packing Company. I permitted the Packing Company to enjoy all the credit that it was possible to enjoy there. In fact, I never handicapped the Packing Company in any form, shape or manner in regard to the credit at the store. They could get credit at any time they wanted to, and all the employees the same way. I was Manager of both the Kake Trading & Packing Company and the Kake Packing Co., but I had a man up there with the Trading Co. I always tried to make the prices of goods sold the Packing Co. as low as possible, and in many cases I sold the stuff absolutely at cost.

Mr. Sanborn visited Kake in the month of August, 1912, and we had a talk with reference to the treatment that should be accorded the Kake Packing Company

by the Kake Trading & Packing Company. Mr. Sanborn insisted that I should bill it all out to the employees and also to—in fact, that covers the entire situation; the employees, cannery and fishermen should receive the benefit of the best prices possible to obtain there. In consequence I gave all of the employees of the Kake Packing Co. a third off from their store bills. In fact, a third discount from off all their store bills.

During the year 1912, the cannery industry met with considerable difficulties, due to a strike in August, 1912, which handicapped our operations very extensively. The strike was not only at Kake, but extended throughout Southeastern Alaska between Ketchikan and Juneau, and the run of fish was not very extra—not even normal—and the price of fish was low as compared with previous years, and comparing it with the year before and the year 1915, it was a very bad year.

At the close of operations for the year 1912, I went to Astoria, and there we closed up our books, and got ready for the next year's operations again. My social relations with Mr. Sanborn at that time were very, very friendly. I visited him, and my relations with Mr. Kendall at that time were very friendly and I visited with him.

“Q. What do you mean when you say visited with him?

A. Why, I went out to his house.”

During the year 1912, Neal Kendall, son of defendant F. P. Kendall, lived at Kake, and our social relations were very friendly. At the close of the packing

season, along in the fall of 1912, the Kake Packing Company was indebted to the Kake Trading & Packing Company about seventeen hundred and sixty-four dollars and some odd cents—I do not remember what it was. There was a payment made in the winter of 1912 and 1913, by a check from Mr. Sanborn for \$2,000.00, I think, all of which was not applied upon the payment of this claim. Part of it was applied on the account and part of it was applied in the use of purchase of mild cured salmon. The Kake Packing Company purchased the mild cured salmon. The Kake Packing Company also installed a Marconi Wireless Telegraph system at Kake, during the year 1912. I think both Mr. Gordon and Mr. Sanborn were glad to have this system built. It was a very expensive affair.

As I have before stated, during the year 1913, I prepared a prospectus of the canning business at Kake. This is the document that I prepared.

Thereupon counsel for plaintiff offered said document in evidence, not for the purpose of proving any fact in the prospectus but simply as bearing upon the witness' attitude towards this industry. It is offered just for the purpose of showing his enthusiasm. In this connection, counsel for plaintiff stated we offer this prospectus for the purpose of showing the witness' attitude. To be fair, while it is true Mr. Kirberger is here as our witness, our suit is really adverse to Mr. Kirberger, just the same as it is to the defendants, and this is simply to show that years ago, thirteen or fourteen years ago, he had great enthusiasm towards the fishing business,

and we set up in our complaint that enthusiasm was so great it led him to be unduly influenced by defendants.

MR. FULTON: If that is all, simply to show he was enthusiastic—if that is evidence of insanity, I may go to the asylum, for it cost me two thousand for my enthusiasm.

Thereupon, the document was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "18," and made a part hereof.

WITNESS CONTINUING: Yesterday, I testified of having drawn up a statement or prospectus in the year 1910. This is Plaintiff's Exhibit "10." I have here in my hand another prospectus that was gotten up in 1911.

MR. ROBERTSON: Q. This is an entry made in 1911. Now, Mr. Kirberger, I wish you would look at this one, Exhibit "10," and state if you would care to correct yourself as to any statement you made yesterday as to which one of these papers was exhibited to defendants Kendall and Sanborn.

A. The later one.

Q. The one of the year 1911?

A. Yes, sir.

Q. Is that a true copy of that prospectus?

A. Yes, sir.

Thereupon, counsel for plaintiff offered the said document in evidence, for the purpose of showing that it was submitted to the defendants.

MR. FULTON: Is that the one you submitted to Sanborn?

A. Yes—Mr. Kendall.

MR. FULTON: That is the identical one?

A. That is the identical one.

Q. Do you mean this identical paper or the same prospectus you drew up in 1911?

A. The same prospectus.

MR. FULTON: What I want to know is whether that is the same paper you handed to Sanborn?

A. I don't know whether the one or not.

Thereupon counsel for defendants objected to the said document being received in evidence upon the ground that it is not shown to have been delivered to either of the defendants. The same was received and read in evidence and is hereunto attached, marked Plaintiff's Exhibit "19" and made a part hereof.

MR. ROBERTSON:

Q. Will you look at that paper—counsel handed witness a letter—now is that a true and correct copy of the original?

A. It is, yes, sir.

Q. And what is it just generally—I don't mean what is in it, but what is it?

A. It is a letter to my sister and brother-in-law, dated October 22, 1911, signed by myself. It was written by me and sent to them.

Thereupon counsel for plaintiff offered page 3 of said letter in evidence for the purpose of showing the

Witness' frame of mind at that time toward the canning industry. "There are a great many irrelevant matters in the letter and of course we don't offer them."

MR. FULTON: "Put the whole thing in."

Same was received in evidence and is hereunto attached, marked Plaintiff's Exhibit "20" and made a part hereof.

MR. ROBERTSON: Will you look at that and state if it is a true and correct copy of what it purports to be.

A. Yes, it is a letter to my brother at Warren, Pennsylvania, of date April 10, 1911. The original was sent to him. It was written by me.

Thereupon counsel for plaintiff offered pages 2 and 3 of such letter for the purpose of showing witness' attitude of mind at that time, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "21" and made a part hereof.

MR. ROBERTSON:

Q. Now, will you look at that and see what that is.

Counsel handed witness a letter.

A. A letter to my brother, Albert Kirberger, dated April 12, 1912, and signed by myself. It is a true copy. It is not the full letter, but this portion was sent to my brother. I do not know what the rest of the letter is. It should be in the letetr filed with all the rest of them. There is no reason why it should not be there.

MR. ROBERTSON: I will state to the Court and counsel that we made an examination of the papers we have and have been unable to find the rest of them. We offer this letter for the purpose of showing the admission of the witness Kirberger, made on April 2, 1912, relative to his subscription for stock in the Kake Packing Co., relative to the attitude of mind towards the defendants Kendall and Sanborn and Mr. Gordon, wherein he speaks of them: "Now, I want you to be sure and meet your payments of stock as fast as called for, for this is a big winter and I have the best people in the country with me, and we will make it a big success." For the purpose of showing his attitude towards the defendants at that time.

Thereupon, counsel for defendants objected to the receipt of said letter, or any letter of like import, being received or read in evidence, upon the ground that the same was immaterial, irrelevant and incompetent, and a self-serving declaration.

THE COURT: At this time, I am not able to understand how they can be material. They maybe later, I don't know, and I suppose they can put them in the record, but with the understanding, however, that the defendants have an objection to all of them, upon the ground that the same are immaterial, irrelevant, and incompetent, and not the best evidence.

Thereupon, the said letter was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "22," and made a part hereof.

MR. FULTON: Of course the admission there made is to a third party. Your Honor is quite well advised it is not competent testimony.

MR. ROBERTSON: Will you look at this paper, Mr. Kirberger, and state if that is a true and correct copy?

A. That is a true and correct copy of a letter to my brother, Albert Kirberger, dated May 4, 1912. It was written by myself, and the original was sent to my brother.

MR. ROBERTSON: We offer this letter in evidence, for the same purpose of showing witness' attitude of mind towards the defendants at that time, and the same was received and read in evidence over the same objections interposed by counsel for defendants heretofore, and the same is hereunto attached, marked Plaintiff's Exhibit "23," and made a part hereof.

Thereupon, the following agreement was entered into between counsel for the respective parties:

It is agreed that the property set forth in the bill of sale and deed executed by the Kake Trading & Packing Company to and in favor of the Kake Packing Co. hereinbefore mentioned is the identical property described in the United States patent and which the Kake Trading & Packing Company obtained through the general conveyances which are now in evidence, and the same stipulation with respect to the bill of sale, except the property has not been patented, and which we desire to show that since May 11th or May 12th, 1914, the de-

fendant Sanborn Cutting Co. has been in possession of and has been using the same.

It is further agreed that the defendant Sanborn Cutting Co. acquired the identical property from the Kake Packing Co. that the Kake Packing Co. acquired from the Kake Trading & Packing Co., together with other additional property subsequently acquired by the Kake Packing Co., and includes the same property transferred by Burwell to the Kake Trading & Packing Company.

WITNESS CONTINUING: Referring back to the organization of the Kake Packing Co., I recall after I came over to Portland from Seattle on the trip I made to see Mr. Kendall, in the first instance, I went back to Seattle, and I saw Mr. E. B. Burwell at that time. Mr. E. B. Burwell at that time was one of the trustees of the Kake Trading & Packing Co., and then I came back to Portland. All this was done before the organization of Kake Packing Co. At the time of the organization of the Kake Packing Co., and at the time I exhibited the prospectus to the defendants, I stated to the defendants that the property mentioned therein belonged to the Kake Trading & Packing Co. I certainly stated so because it was necessary to go back there and have that meeting.

Q. What is this book?

A. It is our stock book, Kake Trading & Packing Company.

Q. Kake Trading & Packing Company, and will you turn to whatever page it is there, Mr. Kirberger,

to show the number of shares of stock that you had in the Kake Trading & Packing Company on February 19, 1912?

A. Here is the amount of stock that I originally owned first, and after purchasing Mr. Burwell's—this date here, and at that date there I owned 24,998 shares.

THE COURT: What was the par value of the shares?

A. One dollar.

Q. What was the total number of shares of the Kake Trading & Packing Company?

A. The total capital stock was \$25,000.00. Each share was of the par value of \$1.00.

Q. How had you acquired these shares? Turn to your stockbook there and let us know the number of shares you originally owned in the Kake Trading & Packing Company?

A. Well, you will have to add these in here; they are all made out in separate certificates. It is pretty hard for me to add them all up in a minute—6,250 shares.

THE COURT: Have you the original stock book?

A. Yes, sir.

MR. ROBERTSON: This is the original stock book.

THE COURT: No, that is the certificates of stock; that is not the original subscription.

A. The original stock book is there, too.

MR. FULTON: The subscription shows Burwell subscribed for these 24,998 shares.

A. Yes, sir, that is correct.

Q. There only seems to be one entry in that book, Mr. Kirberger. I don't see anything else there.

A. There is another one there, page 4. That was the first time. I took a fourth in it; that is the first time.

Q. How many shares did you take the first time?

A. The first time when the Kake Trading & Packing Company was organized, I took a quarter interest of the capitalization of 25,000.

Q. And that shows on your stock book?

A. Yes, sir.

Q. Well, now, Mr. Kirberger, look at this page of your minute book, the original subscriptions—subscriptions to the stock of the Kake Trading & Packing Company.

A. Yes, sir, that is correct.

Q. Well, was there some change made after that original subscription? You note that the subscription shows that Burwell holds 24,998 shares. Was there some change made before the—

A. Before the organization, you mean?

Q. Yes. For instance you just said to the Court you had a quarter interest, and yet I notice there in that book it shows as though Mr. Burwell was taking all except two shares. I want to find out for the Court's information as well as my own how you reconcile these two statements.

A. Then afterwards I subscribed for my stock—afterwards in the Kake Trading & Packing Company, but Mr. Burwell—in fact, he owned the whole thing at that time.

MR. FULTON: This book shows the whole transaction, your Honor, from start to finish. If you just offer that and read it to the Court you will show the whole situation. The witness has it mixed up. The witness is trying to tell absolutely the truth, but has forgotten the facts shown there.

MR. ROBERTSON: That's a very good idea.

Q. Now, the situation was, Mr. Kirberger, that Mr. Burwell took-

MR. FULTON: Just read that in, I submit your Honor.

MR. ROBERTSON: I mean to if it meets with the Court's satisfaction. I will be very glad to do whatever the Court asks.

Q. The situation was that Mr. Burwell owned the property and made a proposal to sell the property for 24,998 shares as shown by this proposal.

A. Yes, sir.

Q. Which is the original, is it?

A. Yes, sir.

Q. Is that Mr. Burwell's signature?

A. Yes, sir.

Q. Then afterwards you purchased from him a quarter. Is that correct?

A. Yes, sir.

MR. ROBERTSON: I would ask that these two pages be marked, if your Honor please—

MR. FULTON: Just read them.

COURT: You say the stock was 25,000?

A. Yes, sir.

COURT: Capital stock?

A. Yes, sir.

COURT: And you purchased one-quarter from Burwell?

A. At that time, yes, sir.

COURT: At what date was that?

A. 1904.

COURT: Did you purchase the balance later?

A. Yes, sir.

Counsel for plaintiff thereupon offered in evidence a writing executed by E. B. Burwell, and the same was received and read in evidence, and marked Plaintiff's Exhibit "24," and is hereunto attached and made a part hereof.

"To Kake Trading & Packing Company:

I hereby propose to you to convey to you in full payment of twenty-four thousand nine hundred and ninety-eight (24,998) shares of capital stock of your company, to be issued to me or to my order, all my right, title, interest and estate, in and to the following described real estate situate in the District of Alaska, United States of America, to-wit:

That certain piece or parcel of land situate about one mile southeast of Kake Village on the northwestern shore of Kupreanoff Island, bounded as follows: Begin-

ning at Stake A and location notice on this beach and running 80 rods along said beach in a southeasterly direction to Stake B; thence running in a northeasterly direction one hundred and sixty rods from Stake B to Stake C; thence running in a northwesterly direction 80 rods from Stake C to Stake D; thence running in a southwesterly direction one hundred and sixty rods from Stake D to Stake A as aforesaid; the location notice whereof is of record in the office of the District Recorder for Wrangel Recording District, Alaska, in Vol. 12 of Mines at Page 110, to which reference is hereby made; together with all buildings, hereditaments and appurtenances thereon or thereunto belonging, and also all rights, privileges and franchises, the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

Also all of the building lumber, cedar shingles, store building and stock of goods, wares, merchandise and fixtures in and about the store building heretofore occupied by one Fred C. Sepp, at Kake Village, Alaska.

And also one cannery site foundation, 50x100, made of piling and timber for cannery, piling enough for wharf, all being situate at Point Ellis, Kuiu Island, Alaska.

Dated Seattle, Washington, this tenth day of June, 1904.

Respectfully submitted,

E. B. BURWELL.

SUBSCRIPTION TO CAPITAL STOCK OF KAKE TRADING & PACKING COMPANY.

The undersigned, each for himself hereby subscribes for the number of shares of capital stock of KAKE TRADING & PACKING COMPANY, a corporation of Seattle, Washington, set after his name, said stock being of the par value of one dollar (\$1.00) per share.

E. B. Burwell, 24,998 shares.

Ernest Kirberger, one share.

S. H. Morford, one share."

Q. You purchased, you mean, the balance of your 24,998 shares later from Mr. Burwell?

A. Yes, sir.

Q. What date was that purchased, do you recall?

A. I think where Mr. Burwell transfers his stock to my name there in the stock certificate book would give the exact date.

Q. Do you see that here, Mr. Kirberger?

A. Yes.

Q. Is that it?

A. That is it, yes, sir.

Q. What date is that?

A. That is dated here August 20, 1909.

MR. ROBERTSON: We will offer that page in evidence. Stock Certificate No. 13 of Kake Trading & Packing Company, dated August 30, 1909, for 18,747 shares to Ernest Kirberger, marked Plaintiff's Exhibit "25."

Q. Then, Mr. Kirberger, was there any further change in the ownership of the stock, made from that time on, up until after February 19, 1912? Was there any further change made in the ownership of the stock?

A. No, sir; I don't think there was. I think there was one slight change there of Mr. Morford in his stock—I think.

Q. Who to?

A. Mr. Burwell to Mr. Morford. I think he had a greater number of shares. You will notice there in the stock book, there. I think Mr. Burwell transferred to him 498 shares—I think.

Q. Well, did you ever acquire any further number of shares in the Kake Trading & Packing Company?

A. After that date?

Q. Yes.

A. I couldn't take any more, only what I had there, after that.

Q. After 1907?

A. After 1907.

COURT: Then at the date of the organization of the Packing Company, I understand you owned all the stock of the Trading Company except two shares?

A. Yes, sir.

The witness produced a letter from George W. Sanborn with telegrams attached, and after duly proving and identifying the same offered the same in evidence, and the same was received in evidence without objection on the part of the defendants, and is hereunto attached, marked Plaintiff's Exhibit "26" and made a part hereof.

The witness also identified another letter written by George W. Sanborn and by him received, of date April 10, 1912, and offered the same in evidence, and the same was received and read in evidence without objection, and is hereunto attached, marked Plaintiff's Exhibit "27" and made a part hereof.

And defendants' counsel admitted the postscript thereto is in defendant Sanborn's writing.

The plaintiff thereupon offered in evidence letter of defendant George W. Sanborn, of date May 16, 1912, to E. Kirberger; letter of Kake Packing Company, by George W. Sanborn, Secretary, to Ernest Kirberger, of date June 1, 1912, and defendants' counsel admitted the postscript thereto is in defendant Sanborn's handwriting; letter of George W. Sanborn to Ernest Kirberger, of date June 11, 1912; letter of George W. Sanborn to E. B. Burwell, of date June 11, 1912, with copies of telegrams attached, signed by Gordon and Sanborn addressed to Ernest Kirberger; letter to George W. Sanborn & Son, of date April 30, 1912, all of which were duly proven and the same were received in evidence without objection, and the same are hereunto attached, marked respectively Plaintiff's Exhibits "28," "29," "30," "30-a," "30-b," "30-c" and "31" and made a part hereof. And defendants' counsel admitted that the originals of all these letters to Sanborn were written on letterhead bearing the words "Kake Trading & Packing Company, Incorporated, Kake, Alaska."

MR. KIRBERGER CONTINUED:

Mr. Hall referred to in the last letter, Plaintiff's Exhibit "31," is manager of the Sanborn-Cram Cannery at Burnett Inlet, and the Sanborn referred to therein is the Sanborn in this case.

Mr. Smith referred to was cannery foreman at Kake and the letter, Plaintiff's Exhibit "31," is a letter to Geo. W. Sanborn & Sons in reply to Plaintiff's Exhibit "27."

I received a letter from Mr. Sanborn in reply to Plaintiff's Exhibit "28." This is the letter.

Thereupon, said letter was offered in evidence and received in evidence, and marked Plaintiff's Exhibit "32," and made a part hereof.

Plaintiff thereupon offered, and there was received in evidence, without objection, and after being duly proven, Plaintiff's Exhibits "33," "34," "35" and "36," and are hereunto attached so marked, and made a part hereof.

MR. KIRBERGER:

Interrogated by Mr. Robertson:

Q. You will note that that letter, Mr. Kirberger—he states "Enclosed herewith please find copy of contract covering five years' agency for the pack or packs of the Kake Packing Co., duly signed as per your request."

MR. FULTON: That is the contract referred to in that letter. We admit it.

Thereupon, said contract was offered and received and read in evidence, and the same is hereunto attached, marked Plaintiff's Exhibit "37," and made a part hereof.

Thereupon, plaintiff after due proof, offered, and there was received and read in evidence, letter from Geo. W. Sanborn to E. Kirberger, of date June 20, 1912; letter of Geo. W. Sanborn to Ernest Kirberger, of date June 26, 1912; letter of Geo. W. Sanborn, Secy., to Ernest Kirberger, of date June 26, 1912; letter to Geo. W. Sanborn & Sons, Astoria, from Ernest Kirberger, of date February 23, 1913; letter from defendant S. S. Gordon to Ernest Kirberger, President Kake Packing Co., of date June 11, 1912; letter from defendant F. P. Kendall to Ernest Kirberger, of date March 1, 1912; letter of defendant F. P. Kendall to Ernest Kirberger, of date May 27, 1912; and letter of defendant F. P. Kendall to Ernest Kirberger, of date June 20, 1912, and the same are hereunto attached, marked respectively Plaintiff's Exhibits "38," "39," "40," "41," "42," "43," "44" and "45."

MR. KIRBERGER: In the last letter, Plaintiff's Exhibit "45," the words "store cans" therein referred to were containers for putting in different things in the store, such as rice cans and fruit cans—display cans. The Kake Trading & Packing Company was buying them from Mr. Kendall, rather from the American Can Company, I presume. That was in the spring—before June 20, 1912, that I had given the order.

Thereupon, counsel for plaintiff offered, and there was received and read in evidence, without objection, letter from defendant F. P. Kendall to Ernest Kirberger, of date July 6, 1912, and the same is hereunto attached, marked Plaintiff's Exhibit "46," and made a part hereof.

Thereupon, counsel for plaintiff, after due proof, offered in evidence letter of defendant F. P. Kendall to Ernest Kirberger, bearing no date, but the evidence shows it was conceded that the letter was written shortly before January 6, 1914, and the same is hereunto attached, marked Plaintiff's Exhibit "47," and made a part hereof.

MR. ROBERTSON: "I expect George to keep you fully posted in regard to details." Right there, Mr. Kirberger, do you know who Mr. Kendall referred to as George. "I expect George has kept you fully posted in regard to details"?

MR. FULTON: I object. The letter is the best evidence. The witness can't state what the writer had in mind.

The Court overruled said objection, and directed said witness to answer the question.

A. Why, I think the defendant, Mr. Sanborn. I have heard him call him that before.

Thereupon, after due proof and identification, counsel for plaintiff offered, and there was received and read in evidence, without objection, letter from defendant F. P. Kendall to Ernest Kirberger, of date May 16, 1913,

and the same is hereunto attached, marked Plaintiff's Exhibit "48," and made a part hereof.

It was agreed that the word "Frank" referred to in said letter meant Frank Sanborn, son of defendant George W. Sanborn.

Thereupon, counsel for plaintiff offered, after due and proper identification, and there was received and read in evidence, without objection, the following letters: Letter from defendant F. P. Kendall to Ernest Kirberger, of date June 11, 1913, and letter of defendant F. P. Kendall to Ernest Kirberger, of date March 13, 1913, and the same are hereunto attached, marked Plaintiff's Exhibits "49" and "50," and made a part hereof.

MR. KIRBERGER: The Mr. Range referred to in Plaintiff's Exhibit "50" was superintendent of the Kake Packing Co. He was employed by Mr. Sanborn, Mr. Kendall and myself.

Q. What had Mr. Range been doing before?

A. He was superintendent, I think, of a cannery at Roe Point.

Q. Now, Mr. Kirberger, did Mr. Range, or did he not in any way supercede you during the year 1913? Did Mr. Range in any way supercede you, I mean, in the work in the cannery in 1913?

A. Supercede me?

Q. Yes. What I mean, supercede—I mean did he take over some of the work at that time that you didn't have any further—didn't have to handle yourself?

A. Did all the work inside the cannery. Had charge of all of it inside.

Q. Do you mean had charge under you or had independent charge?

A. Why, he had explicit charge from the members of the company, Mr. Sanborn, Mr. Kendall and myself, as far as that is concerned.

Q. Did you have charge of the inside work? What was your work during the year 1913?

A. Well, it was mostly outside of the cannery looking after fish.

Q. And Range was sent out from—where was he hired?

A. He was hired from Portland or Astoria.

Counsel for plaintiff then produced a copy of a letter written by witness Kirberger to defendant F. P. Kendall, of date July 10, 1912. It was agreed that the document produced was a copy so far as it went.

MR. ROBERTSON: As I understand it, this letter of July 10, 1912, is admitted to be a true and correct copy of original letter written by Kirberger to Mr. Kendall, as far as the pages go. It runs here a great many pages, but how many more there are, I am sure I don't know.

MR. FULTON: Yes, I don't know either, but we can guess at the rest.

Thereupon, counsel for plaintiff offered, and there was received and read in evidence said letter written by Kirberger to defendant F. P. Kendall, of date July 10,

1912, and the same is hereunto attached, marked Plaintiff's Exhibit "51," and made a part hereof.

Thereupon, counsel for plaintiff, after due proof and identification, offered in evidence, the following documents: Letter from Mr. Kirberger to Mr. F. P. Kendall, of date February 25, 1913, and letter from Kake Trading & Packing Company to Mr. F. P. Kendall, of date August 18, 1913, and the same were received and read in evidence, and are hereunto attached, marked respectively Plaintiff's Exhibits "52" and "53," and made a part hereof.

MR. KIRBERGER: Mr. A. L. Minard was in the store in August, 1913.

Thereupon, counsel for plaintiff offered, and there was received in evidence, after due proof and agreement, a copy of a letter written by Mr. Kirberger to Mr. Geo. W. Sanborn, of date August 26, 1912, and the same is hereunto attached, marked Plaintiff's Exhibit "54," and made a part hereof.

MR. KIRBERGER: Whilst Mr. Sanborn was at Kake, he and I had some conversation as to the prices which he desired to make on the goods which were sold, and I have here a letter notifying him that I had done so, and the statement attached accompanied the letter.

Mr. Snell was working for the Kake Packing Company at the time. He was bookkeeper at Alaska.

The sattement shows the advances made by the Kake Trading & Packing Company to the Kake Packing Co.

during the period from August 19th to August 26th, as is shown in the statement, and the items are all written down here; what they are for, advances for fishing, labor. In other words, the statement shows that the Kake Trading & Packing Company paid the Kake Packing Company, between August 10th and August 26th, the sum of \$1,273.74. That is during the year 1912. This does not have anything to do with the other indebtedness only to the items therein referred to.

Thereupon, counsel for plaintiff offered the said letter, with statement attached, in evidence, and the same was received and read in evidence, without objection, and the same is hereunto attached, marked Plaintiff's Exhibit "54," and made a part hereof.

Thereupon, counsel for plaintiff asked to substitute this original document for Exhibit "54" heretofore offered in evidence, the document here being the original, and Exhibit "54" being a copy. Thereupon, without objection and consent of defendants, the same was received and read in evidence, and marked Plaintiff's Exhibit "54," and is hereunto attached and made a part hereof.

MR. ROBERTSON: I offer in evidence this letter written on a letterhead of the Kake Trading & Packing Co., Incorporated, dated June 30, 1912—either June 30 or June 3—I can't tell which—to George W. Sanborn & Son, from the Kake Packing Company, for the purpose of showing that this corporation, the Kake Packing Company, was familiar itself with the transactions by which these accounts were carried on the books

of the Kake Trading & Packing Company, and also for the purpose of notice that was given to George W. Sanborn by that letter, and which we think, too, the evidence will bring out the fact that notice was given to the Sanborn Cutting Company thereby of these transactions. I understand counsel permits me to offer all of these.

Thereupon, said document was offered and received and read in evidence without objection, and the same is hereunto attached, marked Plaintiff's Exhibit "55," and made a part hereof.

MR. ROBERTSON: This offer, Plaintiff's Exhibit "55," is made in connection with the trial balance thereto attached, not for the purpose of showing that the facts or the accounts set forth in the trial balance are true. The object is to show that the Kake Packing Company itself had due notice of these facts, that is, of the way these accounts were handled. The condition of the Kake Trading & Packing Company during this period of some two years. I, therefore, offer in evidence letter of September 3, 1912, to George W. Sanborn & Son, signed by the Kake Packing Company, by A. V. Snell, with papers attached thereto, but not for the purpose of showing that these statements are correct, because we have not examined them.

Thereupon, the same was received and read in evidence without objection, and the same is hereunto attached, marked Plaintiff's Exhibit "56," and made a part hereof.

KIRBERGER CONTINUING: This paper that I have in my hand is a statement of the Kake Trading

& Packing Company in account with the Kake Packing Company. This statement, I verily believe is true and correct. I am familiar with the accounts therein, and to the best of my information, it is a true and correct statement. It is a statement from the books of the Kake Packing Company, and whenever possible, there are invoices accompanying these statements. This statement was made by the bookkeeper of the Kake Packing Company under my supervision. It covers the period from March 18, 1912, to November 30, 1912, showing a balance due the Trading Company of \$7,464.54.

Thereupon, counsel for plaintiff offered said statement in evidence, and the same was received and read in evidence, without objection, and is hereunto attached, marked Plaintiff's Exhibit "57," and made a part hereof.

KIRBERGER CONTINUING: In regard to the item, reading "July 31, to real estate charged back \$1,750," I will state that on July 31, during Mr. Sanborn's visit at the cannery in August, 1912, he said to me that inasmuch as the patent had not been received yet by the Kake Packing Company from me or the Kake Trading & Packing Company, it would appear better to the stockholders and all concerned with the Kake Packing Company that it should be charged back to me on our account until such time as the patent had come through, that is, it should charge back to the account of the Kake Trading & Packing Company, and he instructed our bookkeeper, Mr. Snell, to make the entry accordingly. I was present at the time, and the books

were so charged. This \$1,750.00 has reference to the identical real estate which was embraced within the deed which the defendant admitted the Kake Trading & Packing Company made to the Kake Packing Company. This credit was never placed back to my knowledge. No charge, however, was made in the books of the Kake Trading & Packing Company. It was carried as originally made.

THE COURT: I understand that is a charge against the Packing Company; that is a charge of \$1,750.00 to the Packing Company, isn't it?

A. No, sir.

THE COURT: What account have you there, then?

MR. ROBERTSON: This is the Kake Trading Company in account with the Kake Packing Company.

THE COURT: Then the Trading Company owed the Packing Company seven thousand dollars in the fall of 1912.

MR. ROBERTSON: No, your Honor, just the opposite way. The Kake Packing Company owed at that time to the Kake Trading Company \$7,464.54; the first page here constitutes the debts which the Kake Trading Company owed to the Kake Packing Company under the bookkeeping system, amounting to \$8,700.16. The next page constitutes the credits which amount in all to \$16,164.70, and the difference was in favor of the Kake Trading Company, and this charge of \$1,750.00 was a charge which the Kake Packing Com-

pany made back against the Kake Trading Company—a debit against the Trading Company.

THE COURT: The first is a debit account with the Trading Company against the Packing Company, and then follows the credits.

MR. ROBERTSON: It is a charge—the Kake Packing Company charged against the Trading Company \$1,750.00—

THE COURT: That isn't the account you have in your hand. I don't know what they intended to do but that shows the account just reversed. Look at that heading—Kake Trading Company charging the Packing Company.

MR. FULTON: The defendants conceived that the Kake Packing Company charged back the Trading Company a sum equal to \$1,750.00 on account of the purchase price of the lands purchased by the Kake Packing Company from the Kake Trading & Packing Company, because of the fact that no patent had been issued, and the entry in the books of the Kake Packing Company shows this fact. The account offered in evidence is misleading—it should be reversed. This \$1,750.00 was to be paid the Trading Company when a patent to the lands in question was issued, and the books show this.

MR. ROBERTSON:

Q. Mr. Kirberger, do the Kake Trading & Packing Company books show either the balance due to the Kake Packing Company up to the year 1913—the Kake

Trading & Packing Company books—does that show the amounts due from the Kake Packing Company up to and including the year 1913?

A. Yes, sir.

Q. It will be in one of the ledgers?

A. Yes, sir.

Q. Which one of these books would it be in?

A. That one you have there would show the last account. There is another ledger besides this one here, and there are some extra sheets besides these that you will have to get for me.

Thereupon, the books were delivered to the witness.

Q. Now, Mr. Kirberger, will you turn to the account in your books of the Kake Packing Company; are those the books, Mr. Kirberger, the regular books of account of the Kake Trading & Packing Company?

A. Yes, sir; they are.

Q. And kept in the regular course of business?

A. Yes, sir.

Q. Either by yourself or by some one under your supervision?

A. Yes, sir.

Q. And are you able to testify as to the correctness of the accounts therein?

A. Yes, sir.

Q. Tell us what the balance shows there that the Kake Packing Company owed the Kake Trading & Packing Company on the date of January 6, 1914, or the date nearest antecedent to that date?

A. According to our books there the Kake Pack-

ing Company owed the Kake Trading & Packing Company \$10,333.31. You will find that over there.

THE COURT: That is January 6, 1914?

Q. Now, Mr. Kirberger, has there been any payment made since January 6, 1914, on that?

A. No, sir.

MR. FULTON: What page do you find these accounts on that you spoke of?

A. This here starts in the index, Mr. Fulton; you can see right here. "Kake Packing Company 23." And over here this, "Kake Packing Company 41," and these accompany the same account.

MR. ROBERTSON:

Q. Now, Mr. Kirberger, does that \$10,333— and some odd, include this \$1,750.00?

A. Yes, sir. This \$10,333.31 is for supplies and materials furnished the cannery, for labor and for fish, etc., like that, around the cannery. I paid the cannery bills and charged it to them.

THE COURT: You spoke at one time in your testimony about supplies that were charged to the laborers; that you sold to the laborers and charged to them on your books. Did you charge all that to the Packing Company?

A. Well, all the supplies that any employe bought from there, we had to charge the difference that was not paid them in their settlement at the cannery; for instance the cannery would pay the account that was—I can ex-

plain better by giving an illustration. If a man brought in or had \$500.00 fish credit there at the cannery and he owed an account at the store of \$250.00, why, we transferred the difference, or \$250, to the store account and the \$250 was paid at the cannery to this man here, and as far as the person was concerned it was a full settlement, but we didn't transfer the accounts until a little bit later to the store account.

THE COURT: Suppose the man owed you \$750 and he had a \$500 account at the cannery; suppose he owed the store \$750, and had a \$500 account at the cannery, then you would do what?

A. Why if he had—we wouldn't get the \$250.

COURT: You wouldn't charge the \$250 to the cannery?

A. No, sir; we would not.

MR. FULTON: The Kake Packing Company books show that the indebtedness to the Kake Trading & Packing Company is \$8,582.81. If you add the \$1,750 to that you will get your \$10,333.31, or within fifty cents of it.

Thereupon counsel for plaintiff after proving the execution and receipt of a letter from Frank Sanborn, offered the same in evidence and the same was received and read in evidence without objection and the same is hereunto attached, marked Plaintiff's Exhibit "58," and attachment Plaintiff's Exhibit "58-b," and made a part hereof.

KIRBERGER CONTINUING: I was at Astoria in the fall of 1913, and the Kake Trading & Packing Company were very urgently in need of funds at that time and we were not paying our bills very fast. We were writing letters to our creditors and stating our affairs and waiting until we got funds to pay them with. There was an action brought against the Kake Trading & Packing Company at that time, at Juneau, in the fall of 1913. The action was brought by the Regal Gasoline Engine Company. With regards to the condition of the Kake Packing Company in the fall of 1913, there was no satisfaction among the stockholders, Mr. Kendall, Mr. Sanborn and myself. They criticised the management, and they criticised my handling it. They were very much disappointed with the results of the season's operations. The season's operations were not successful. In the fore part of January, 1914, Mr. Sanborn and Mr. Kendall felt that they had advanced and supported the Kake Packing Company to a very great extent, and they didn't feel like putting in any more money in it, and we were talking over the idea of my trying to get additional funds from the East to put into the cannery to operate for the next year. Mr. Kendall and I had a conversation, perhaps a month or so before this, while at Portland, and then afterwards we met Mr. Sanborn—Mr. Kendall and I met in Astoria at Mr. Sanborn's office and discussed the situation very extensively that evening, which was probably the third, or fourth of January, 1914. Mr. Sanborn criticised the affairs of the Kake Packing Company very harshly, and criticised the handling of the affairs by myself. I don't know how

he would express it, but he felt very much put out about the situation on account of not making a better showing, and told me so. In fact, he went so far that he thought the affairs were not handled honestly throughout; that there was something crooked; that there was a whole lot of money spent and nothing to show for it.

Q. Did Mr. Kendall have anything to say about that?

A. Not in particular; no, sir.

Q. What did you have to say about that?

A. Well, I told him that the books were there and open and subject to the inspection of anybody that wanted to look at them.

Q. Now, do you recall whether or not on January 5, 1914, you took up with your people back East anything?

A. Yes, sir.

Q. What did you do on that date—January 5th, now mind.

A. On January 5th, I talked the matter over of trying to secure money from my brother in the East first; perhaps he could get some of his friends to join him, and we formulated a telegram. Mr. Kendall and I did that and sent that on East.

Q. You sent a telegram East. Do you recall the amount of money that you were trying to raise at that particular time?

A. I think about eighty-four thousand or eighty-five.

Q. How did Mr. Kendall talk about Mr. Sanborn's attitude towards you? Did Mr. Kendall express himself at all as to the attitude of Mr. Sanborn toward you?

A. Well, he said that if I had anything to say I should screw up my back. If I had anything to say in any form, shape or manner, not to be afraid to say it.

Mr. Kendall was friendly towards me. I was, however, not successful in raising the \$85,000.00.

On January 6, 1914, I had another meeting with Mr. Sanborn and Mr. Kendall. There were present at that meeting Mr. Sanborn, Mr. Kendall and myself.

Q. Now, will you look at this paper, Mr. Kirberger, and state whose signatures—original signatures are attached to that if you recognize them.

A. Mr. Sanborn, Mr. Kendall and myself.

Q. Was that paper made on that date, on the date that it bears, January 6, 1914?

A. Yes, sir. It was made at Astoria, Oregon, in Mr. Sanborn's office, in the presence of Mr. Sanborn, Mr. Kendall and myself. I think Mr. Kendall wrote it first and then it was copied afterwards.

Thereupon, counsel for plaintiff offered said document in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "59," and made a part hereof.

MR. KIRBERGER CONTINUING:

The last part of this document is in the handwriting of Mr. Kendall. Neither Mr. Kendall, nor Mr. Sanborn, during the years 1912 or 1913, advanced any money to me, or to my brother personally.

Q. Then that statement—is that statement herein, incorrect where it says: "Said stock is hereby transferred to F. P. Kendall and George W. Sanborn for

account Ernest Kirberger and A. C. Kirberger?" Is that true or not true? That statement on its face?

A. Why, it isn't true, as far as that is concerned. He never advanced me personally; advanced the Kake Packing Company.

Q. Or to your brother?

A. Or to my brother, either.

THE COURT: Is there any controversy about this stock in the name of Ernest Kirberger?

MR. FULTON: Absolutely none. We don't claim to own the stock; we have it here; they can have it if they want it.

THE COURT: You don't question but what it was transferred to you?

MR. FULTON: It never was transferred. Just endorsed in blank and handed over to us for keeping.

COURT: Certificate was handed over?

MR. FULTON: Just the certificate endorsed in blank was handed over; we have them right here.

Stock certificate produced.

MR. ROBERTSON: We will offer in evidence, if the Court please, stock certificate No. 2 for 125 shares, in favor of Ernest Kirberger, under date of January 21, 1913, together with the endorsement thereon. The same was received and read in evidence, without objection, and is hereunto attached, marked Plaintiff's Exhibit "60," and made a part hereof.

MR. KIRBERGER CONTINUING:

On the same date, there was an assignment made of the store account. This is the original document. I think it was prepared by Mr. Sanborn and signed by myself.

Thereupon, counsel for plaintiff offered said document in evidence, and the same was received and read in evidence, without objection, and is hereunto attached, marked Plaintiff's Exhibit "61," and made a part hereof.

MR. ROBERTSON:

Q. Mr. Kirberger, you will notice a couple of words there "to date." Can you tell in whose handwriting "to date" is?

A. Mr. Sanborn's.

Q. Now, Mr. Kirberger, there is an assertion in this assignment: "In consideration of one dollar to me in hand paid, the receipt of which is hereby acknowledged, and other valuable considerations, I hereby sell, assign, etc." Will you kindly tell the court what other considerations you got for signing that assignment if anything?

To this question, counsel for defendants objected upon the ground that the same was immaterial, irrelevant and incompetent.

THE COURT: Let him state the circumstances under which made and we will determine.

A. It was made for the purpose of going east and raising the funds to assist in operating the cannery the

next year, or in other words assisting to finance the Kake Packing Company, from the fact that Mr. Sanborn and Mr. Kendall had already advanced and put up a good deal of money into the proposition, and it was my idea to do all in my power to assist them in getting money to put in and operate again, and I didn't wish to see the cannery go bankrupt or go into the hands of a receiver.

Q. Why did you assign your store account of \$8582 to them?

A. Because they gave me that instrument there, an option on their stock for the consideration of \$65,000. If I was to raise \$65,000, that would pay what Mr. Kendall and Mr. Sanborn had in the proposition and put the cannery on a good footing.

Q. The original par value of the Kake Packing Company was \$100.00.

A. Yes, sir.

Q. And on this date you signed this assignment, providing that upon the payment of the sum of \$65,000, the defendants Kendall and Sanborn should assign and transfer to you, or to your order, 170 shares of the stock of the Kake Packing Company "now standing on the books of the company as follows:" didn't you?

A. Yes, sir.

Q. In other words, under that assignment, you got an option to pay \$65,000 for 170 shares of the stock of the Kake Packing Company. Is that true?

A. That is true, as far as stated there, yes, sir.

Q. Well, now why did you make the assignment of your store account, amounting to \$8582.21?

A. Because there was about ten thousand dollars of liabilities, outstanding accounts, in addition to that, that the cannery owed the wholesalers and jobbers for lumber, etc., in addition, and they claimed that they would pay these bills, there themselves out of their own pocket, if I would assign my store account; in order to enable me to go east and make that deal; to prevent others on the outside from interfering and jumping on the Kake Packing Company.

Q. The defendants, Mr. Kendall and Mr. Sanborn, would pay the liabilities, certain liabilities of the Kake Packing Company, amounting to about ten thousand dollars?

A. Yes, sir.

Q. If you would assign to them—

A. My store account.

Q. The account of some eighty-five hundred dollars which the Kake Trading & Packing Company had against the Kake Packing Company?

A. Yes, sir.

Q. Did you receive any other consideration for making that assignment?

A. None whatever, outside of I received a dollar on the account for the store. I received a dollar for that instrument and a dollar for the other one, I think.

Q. You think they handed you a dollar a piece?

A. Yes, they did.

Q. Now where did you say this was made?

A. What date?

Q. In whose office was it made?

A. Mr. Sanborn's office.

Q. In the presence of Mr. George W. Sanborn, Mr. Kendall and yourself?

A. Yes, sir.

Q. Anybody else present?

A. Not to my knowledge.

Q. Did you have an attorney present?

A. No, sir.

Q. Did you have advice of any attorney before signing the papers?

A. No, sir.

MR. FULTON: Did Sanborn and Kendall?

A. I couldn't say as to that, Mr. Fulton.

MR. FULTON: I don't think anybody will contend that their lawyer drew that.

Q. Now, do you mean, Mr. Kirberger, that an attempt—or that you were endeavoring to hold up the Canning Company by making this—by making these two assignments?

A. Why I considered that it would be of great assistance to them as well as myself, and in making the deal east that I contemplated at the time.

Q. Now, were you ever authorized in any way by the Kake Trading & Packing Company to make these assignments?

A. No, sir.

MR. FULTON: I object to that as calling for his conclusions. What his authority was is a question of law.

THE COURT: That is perfectly clear; the records of the company will show whether he had any spe-

cial authority, if that was necessary; and his position as general manager would determine whether he could do it as general manager.

MR. ROBERTSON: Now, at this time, if the court please, I understand that this entire book is in evidence—the minute book of the Kake Trading & Packing Company. I understood the court to so state.

THE COURT: No, I didn't say it was in evidence.

MR. ROBERTSON: If not, I will put it in evidence.

THE COURT: Very well.

MR. ROBERTSON: I would ask that this book be put in evidence; there are one or two loose letters in there.

MR. FULTON: They are not mine.

Thereupon, counsel for plaintiff offered said book in evidence, and the same was received in evidence without objection, and is hereunto attached, marked Plaintiff's Exhibit "62," and made a part hereof.

MR. ROBERTSON: I particularly call the court's attention to the By-laws, section 4 of Article 2, which reads: "The Board of Trustees shall have the control and management of the affairs and property of the company, and no deed, mortgage or contract for the sale or purchase of any real estate, or the transfer of any shares of stock owned by the company shall be valid un-

less it shall be authorized by the Board of Trustees, and no such deed, mortgage or contract shall be deemed to have been duly executed on behalf of this company, unless it shall be sealed with the seal of the company, signed by the president and attested by the secretary.

MR. FULTON: No meeting of the stockholders or directors of that company from the time the Kake Packing Company was organized, until long after it went into bankruptcy, was there?

MR. ROBERTSON: Yes, was a meeting after the Kake Packing Company organized, Mr. Fulton.

MR. FULTON: I don't think so, excepting that last mentioned.

MR. ROBERTSON: Meeting February 29th.

MR. FULTON: Last minutes; all that time he was transacting business up there for the corporation.

MR. ROBERTSON: We are not trying to conceal anything from the Court.

MR. FULTON: I didn't say so; I beg your pardon; it would certainly be very unkind and very ungentlemanly for me to do so.

MR. ROBERTSON: Certainly would.

MR. FULTON: I simply recited the fact that from February 29, 1912, until March 17, 1915, not one solitary meeting of the stockholders or Board of Directors was ever held of this corporation. The complaint

shows this man was in charge of the business up there all that time.

MR. CROSSLEY: Might have been in charge of the business but he wasn't authorized to make assignments for the corporation.

MR. ROBERTSON: Also section 2 of Article 3: "It shall be the duty of the president to preside at all meetings of the stockholders and Board of Trustees. He shall exercise control and supervision over the affairs and business of said company generally and shall sign all deeds and contracts when so authorized by the Board of Trustees, and shall sign all certificates of stock of said corporation on behalf of said company. In all cases where the duties of subordinate officers and agents of the company are not specially prescribed by the Board of Trustees or by the By-Laws they shall obey the president or general manager."

It also provides that the treasurer shall sign the company's name to all checks for drawing money from the bank, and "shall endorse the company's name to all drafts, checks or orders payable to said company and shall receipt for all money due the company but he shall not pay out or disburse any money except on an order signed by the president and secretary or general manager, except where special authorization in writing has been required by the Board of Trustees so to do."

COURT: That is the general manager, you are reading?

MR. ROBERTSON: That is the treasurer, if the court please; that is section 6, Article 3. Section 7, Article 3 provides: "The general manager shall have the active control and direction of all details incident to the daily transaction of the business of the company. He shall employ all clerical or other assistance necessary in the conduct of the company's affairs and all employees other than those enumerated herein shall answer to him and he shall have full control over them. It shall be his duty to see to the carrying out of the general policy of the company in the conduct of its affairs and such special acts as the Board of Trustees may determine upon, and in the absence of special direction he shall be authorized to use his own discretion as to the methods and means he shall employ to accomplish the desired results. He shall, however, be always limited and controlled by the provisions contained in the by-laws of the company and ultimately by the Board of Trustees."

I also desire to call the court's attention, and I will offer in evidence, the following portion of this resolution under date of February 29, 1912:

"Seattle, Washington, February 29, 1912.

Upon adjournment of the stockholders a meeting of the Trustees was held, with all the Trustees present. Upon motion duly seconded, Mr. Ernest Kirberger was elected president and general manager, Mr. E. B. Burwell vice-president and treasurer, and Mr. Seth H. Morford secretary." This for the point of showing the officials of that date.

Now, of course, it is a negative proposition, if the court please, but we desire to call the court's attention to the fact that in this book, as far as we are able to find—while I realize that it is negative—there is no record of any such resolution granting to Mr. Kirberger authority. And we also desire to offer in evidence the minutes of the Trustees' meeting in Seattle, Washington, March 17, 1915, which read as follows:

MR. FULTON: I would like to ask the witness a question about that before it is read. This resolution, Mr. Kirberger, or this question the gentleman is just asking you, has reference to a meeting of the trustees, March 17, 1915, as shown in this book, Exhibit "62." I notice that Mr. George D. Emery was elected one of the directors or trustees, at that time. He was simply your attorney, wasn't he?

A. He was at that time—at that particular time.

MR. FULTON: It was your stock that he owned?

A. Yes, sir.

MR. FULTON: He held it in your name, his one share?

A. His one share.

MR. FULTON: That was your stock?

A. Yes, sir.

MR. FULTON: That was a fact, is it not?

A. No, sir, it is not.

MR. ROBERTSON: I think that is—

MR. FULTON: Now, be careful, Mr. Kirberger, because this is when you were busted. You don't mean to say that a lawyer over there in Seattle bought one share of stock in this concern and had himself elected when he knew that you were insolvent, and it shows here you were insolvent; that can't be true; just think about it.

MR. CROSSLEY: If your Honor please, we are not claiming Kirberger was insolvent.

COURT: Part of this record.

MR. FULTON: I want to know who made this record.

MR. CROSSLEY: If you will turn to the page prior to that, I think you will see.

MR. FULTON: You had a meeting March 17th, in which a Mr. Morford owned one share? Mr. Morford owned one share of stock?

A. Yes, sir.

MR. FULTON: He transferred that share to your attorney, Mr. Emery?

A. Yes, sir.

MR. FULTON: Now, you owned that share of stock, as a matter of fact, between man and man, didn't you? That was your stock?

A. Not that one share.

MR. FULTON: Who owned that one share?

A. Mr. Morford.

MR. FULTON: Now, you took Burwell's—Burwell, of course, was bankrupt; he went through bankruptcy in 1912?

A. Yes, sir.

MR. FULTON: That was your stock in Burwell's name?

MR. CROSSLEY: I think he testified that he bought some of Burwell.

A. I owned—

MR. FULTON: I know this one share Burwell owned, didn't he hold that for you—on the square?

A. He didn't hold for me; he held as a stockholder in the Kake Trading & Packing Company.

MR. FULTON: That is what I want. You owned the stock but had to have three men there to maintain your officers?

A. Yes, sir.

MR. FULTON: And you owned all that stock?

MR. ROBERTSON: We object to any such interrogatory as that, if the court please. It seems to me that is placing testimony in the witness' mouth.

COURT: I think he can answer the question.

MR. FULTON: I say, as a matter of fact, you had to have three men in order to maintain the corporation, didn't you?

A. Absolutely so.

MR. ROBERTSON: That is a conclusion of law.

MR. FULTON: I say he understood that; so you had these two shares of stock, one in Burwell's name and one in the name of Emery?

A. Yes, sir.

MR. FULTON: So as to maintain the corporation?

A. Yes.

MR. FULTON: As a matter of equity, you owned these two shares of stock. The equity belonged to you; they never paid a cent for them.

A. I never owned more than these 24,998 shares.

MR. FULTON: What did this Emery take this share of stock for, then?

MR. CROSSLEY: I think he has answered the question, if the court please; he said he owned only 24,998 shares.

COURT: No, he has not answered.

MR. FULTON: You are trying to tell him how to answer, very clearly.

A. The object in owning that is to keep the company intact.

MR. FULTON: That is what I am saying; Kirberger, Ernest Kirberger bought that stock, did he?

A. I think he paid a dollar for it.

MR. FULTON: Who to?

A. Well, I don't know; I can't remember whether I took it or not.

MR. FULTON: What I want to get at and what we all want is the truth.

A. Yes, sir.

MR. FULTON: Sweet, lovely, beautiful truth. Mr. Burwell was a bankrupt in 1912; he went bankrupt in 1912. That stock was—all of this stock, even though only 24,998 shares was held in your name, really as a matter of fact these other men only had that for the purpose of keeping your organization?

MR. ROBERTSON: We desire to interpose an objection there.

A. We always had to have that.

MR. FULTON: I say they held it for that purpose, didn't they, so you could have three men in there?

A. Yes, sir.

MR. FULTON: That is the object. Didn't make any difference to them what you did because the whole business was owned by you, wasn't it, as a matter of fact?

A. Yes, sir, I owned the control of the stock.

MR. FULTON: Well, you owned all the stock?

A. Yes, sir.

MR. FULTON: Absolutely.

A. I didn't own it all—except those two, you understand.

MR. FULTON: I understand you had those two put in their name, so they could act as incorporators with you?

A. Yes, sir.

MR. FULTON: Now, if your Honor please, I object to this question, on the ground this corporation is owned exclusively by—

MR. ROBERTSON: I would like to straighten Mr. Kirberger out on that proposition, to see if he understands it.

Q. (Mr. Robertson) Mr. Kirberger, let me ask you this: Do you mean to say you owned the one share of stock that stood in the name of E. B. Burwell?

A. No, sir, I didn't say I owned it.

Q. Did you own the one share of stock, or did you ever own the one share of stock that stood in the name of Morford?

A. No, sir.

Q. Seth H. Morford?

A. No, sir.

Q. The share that stood in the name of George D. Emery?

A. No, sir.

Q. Was Mr. Morford one of the original incorporators?

A. Yes, sir.

Q. Have you already told the court how many shares you took in the original corporation, according to the stock certificate book?

COURT: Originally subscribed by Burwell, all except two shares.

A. Yes, sir.

COURT: He is the only man that did subscribe for it, isn't he?

Q. And afterwards you purchased from Burwell a quarter interest?

A. Yes, sir.

Q. And later you purchased all of his shares but one share?

A. Yes, sir.

MR. ROBERTSON: (Reading Exhibit "62," minutes of stockholders' meeting of March 17, 1915:)

Seattle, Wash., March 17, 1915.

A meeting of the trustees of the Kake Trading & Packing Company was duly held at the office of Geo. D. Emery, No. 419 Central Bldg., Seattle, Washington, on March 17, 1915, at nine o'clock A. M., pursuant to the foregoing waiver of notice.

Present: Trustees Kirberger, Burwell and Morford.

Mr. Morford tendered his resignation in writing, of his office of Trustee and of his office of Secretary of this corporation. On motion of Mr. Burwell, the resignation was accepted.

Thereupon Geo. D. Emery was duly chosen by the Board of Trustees, as Trustee, in place of S. H. Morford, resigned.

Geo. D. Emery thereupon duly qualified as such Trustee and filed his oath in writing as such.

Thereupon on motion of Mr. Burwell, Geo. D. Emery was duly elected Secretary of this corporation. Mr.

Emery was present and accepted said office and assumed the same.

Thereupon, President Kirberger stated the financial condition of the corporation and the particulars of its business and affairs.

It appeared that all the property of the corporation is now in the hands of the United States Marshal at Kake, Alaska, under attachment for debts of this company, past due and unpaid; also that this corporation is unable to pay its debts or continue its business and is insolvent.

Mr. Kirberger further reported the facts concerning the transfer of an account of this company against the Kake Packing Company, exceeding eight thousand five hundred dollars (\$8,500) to Messrs. Sanborn, Kendall, et al., and also the transfer to them of twelve thousand five hundred (\$12,500) dollars of the capital stock of the Kake Packing Company, which stock was and is the property of this corporation and which was transferred by Mr. Kirberger without authority of this Board. Thereupon on motion of Mr. Burwell, the following resolution was unanimously adopted:

RESOLVED, that this corporation does in all things disavow, repudiate and disaffirm the action of Mr. Kirberger in transferring \$12,500 of its stock in the Kake Packing Company, held by him as trustee for this corporation, and in no way ratifies or confirms such transfer.

On like motion the following resolution was unanimously adopted:

WHEREAS the property of this corporation, its store, stock and business, are under attachment and its debts cannot be paid in the usual course and it is indebted to an amount exceeding the full value of its assets, and is insolvent, now therefore;

RESOLVED, that this corporation is insolvent and is willing to be adjudged a bankrupt on said grounds and the President is authorized and directed to appear and enter the consent of this corporation in any proper court to the entry of a decree adjudging it to be a bankrupt, and to take all proper steps to that end and pursuant to such adjudication, whether voluntary or involuntary, to make and file proper schedules of assets and liabilities and to do all things in that behalf required by law. He is authorized to file its voluntary petition in bankruptcy if he deems it desirable so to do and to take all proper steps to that end and pursuant to such adjudication, whether voluntary or involuntary, to make and file proper schedules of assets and liabilities and to do all things in that behalf required by law. He is authorized to file its voluntary petition in bankruptcy if he deems it desirable so to do and to take all proper steps thereunder.

On motion of Mr. Burwell, the following resolution was unanimously adopted:

RESOLVED, that this corporation repudiates and disaffirms the act of its President in transferring its ac-

count of more than \$8,500, against the Kake Packing Company, and directs that proper steps to recover the same be taken.

No further business appearing, adjourned.

Ernest Kirberger,
President.

Ernest Kirberger,
E. B. Burwell,
Geo. D. Emery,
Trustees.

Attest:

Geo. D. Emery,
Secretary.

COURT: How did this last corporation meeting come to be called?

A. We were in Seattle at the time, attending a meeting—I was taken down there with the attorney for the creditors; to interview the creditors for the Kake Trading & Packing Company.

COURT: You didn't report these two transactions to the corporation prior to that time?

A. I didn't, no, sir.

COURT: And this action was taken after you knew you were insolvent and in view of a possible petition in bankruptcy, was it?

A. Yes, sir.

KIRBERGER CONTINUING:

The assignment of the stock in the Kake Packing Co. was made for the purpose of enabling me to get

money from the East to assist in financing this proposition for the next year. The assignment of the merchandise account was made with the understanding that as there was about ten thousand and some hundred odd dollars extra outstanding liabilities against the Kake Packing Co. which Mr. Sanborn and Mr. Kendall agreed to pay, providing I made the assignment of that store account. The only money that I received for the assignment of the stock, as well as the assignment of the store account, was \$2.00, \$1.00 for each assignment.

I was and have been familiar with the affairs of the Kake Trading & Packing Company since its organization, and up to the time it was adjudicated a bankrupt.

Q. Now, can you state from your knowledge whether or not the Kake Trading & Packing Company has ever since that time, or at that time received any consideration for either one of those papers?

A. No, sir.

Q. You say it did not?

A. It did not, sir.

Q. Who was present at the making of these assignments?

A. Mr. Sanborn and Mr. Kendall and myself.

Q. In whose office were they made?

A. In Mr. Sanborn's office, at Astoria, Oregon.

Q. Did you have an attorney present?

A. No, sir. Just the three of us were there together.

Q. Now, after the making of these assignments, did you have occasion to make a statement of liabilities and assets of the Kake Packing Co.?

A. Yes, sir.

Q. And will you look at that paper, Mr. Kirberger, and see if you recognize it?

A. Yes, sir, I do. It is simply an inventory of the Kake Packing Company up to January 1, 1914. That is the first sheet. The second sheet shows the entire liabilities of the Kake Packing Co. of date January 1, 1914. If I remember rightly, I made this statement myself, with the assistance of Mr. Sanborn and it was made either January 1st, 2nd, 3rd, 4th or 5th, and I think shortly prior to these two assignments, so we had something to figure on. It was made in contemplation of these two assignments. At the making of this paper, I was familiar with the books and accounts, and had access to the books of the Kake Packing Co. and I believe it is a true and correct statement of the liabilities and inventory of the Kake Packing Company, to the best of my knowledge and belief, and so far as I know it is true.

The first page is a correct valuation of the assets of the Kake Packing Company, to the best of our ability, and I can't conceive of any idea of trying to make any changes in any form, shape or manner.

This is the paper that I took East with me to show to the Eastern people and that is what it was made for.

COURT: Was that paper made out before the transfer of the stock and account?

A. It was made out just at the same time, Judge.

COURT: Did Sanborn know about it?

A. Yes, sir.

Thereupon counsel for plaintiff offered said statement in evidence. To the receiving of the same in evidence counsel for defendants objected upon the ground that it was incompetent, immaterial and irrelevant, and not an honest paper, but the objection, however, was overruled and the document was received and read in evidence and is hereunto attached, marked Plaintiff's Exhibit "63" and made a part hereof.

Interrogated by Mr. Robertson, MR. KIRBERGER:

Q. Now, Mr. Kirberger, you will notice on the second page of this there is a certain heading "To be paid by George W. Sanborn and F. P. Kendall?"

A. Yes, sir.

Q. Then following a list of amounts with names amounting to \$10,956.96?

A. Yes, sir.

Q. Now, a few moments ago, you told his Honor that Sanborn and Kendall—it was either this morning or last evening—agreed that they would pay some ten thousand dollars if you would throw off or assign to them the eighty-five hundred and some odd dollars account due the Kake Trading & Packing Company. Is that true?

A. Yes, sir.

Q. Now, Mr. Kirberger, is that a list of what Kendall and Sanborn were going to pay?

A. Yes, sir.

Q. Then, Mr. Kirberger, had your store assignment—I mean the assignment of your store account been

already assigned to these gentlemen prior to the making of that account—prior to the making of that paper? You understand what I mean?

A. Yes, I understand. I can't say; it was just done—the entire transaction—they were all done the same day and the same time, as far as I knew.

Q. They were all done in contemplation of each other?

A. Yes, sir.

Q. Now, as far as the statement was concerned, when you were taking it back east—

A. Yes, sir.

Q. The Kake Trading & Packing Company account didn't show on the paper because it had been placed in the hands of Mr. Kendall and Mr. Sanborn?

A. Yes.

Q. I notice here that there is \$84,106.12, and then down underneath is another item of fire insurance \$927.25. Just tell the court whether or not the \$927.25 is included in the eighty-four thousand or is additional to it?

A. I don't think it was included in at that time. The fire insurance was something we couldn't figure out definitely what it would be, at the time; and there are some other items there we couldn't figure exactly, and they were general. The inventory was changed on that; when I came back the inventory was changed on that. Wasn't the same when I went away as it was when I returned.

Q. Now, there is an item here, Mr. Kirberger, of bills payable \$20,359.84. Can you state as to in whose favor that bills payable was? Can you state that from your independent knowledge at this time?

A. Well, it was funds we borrowed from the bank.

Q. Funds you borrowed from the bank?

A. Yes, sir.

Q. Do you know of your own knowledge, whether or not that is the amount that Kendall and Sanborn or both of them—in which they endorsed the paper of the Kake Packing Co. to the bank?

A. I think they did.

Q. Is that the amount?

A. Yes, sir, that is the amount as near as I can remember.

Q. Now, there is the item here, American Can Company, \$10,504.15?

A. Yes, sir.

Q. Is that the same company that Mr. Kendall was, at that time, the representative of?

A. Yes, sir.

Q. Was that for goods which the Kake Packing Company had purchased?

A. Yes, sir.

Q. From Mr. Kendall as agent of the American Can Company?

A. Yes, sir.

Q. There is an item of \$4,004.35, F. P. Kendall?

A. Yes, sir.

Q. That is the defendant Kendall?

A. Yes, sir.

Q. Do you recall now, at this time, what that was?

A. I think it was a personal loan that Mr. Kendall made the Kake Packing Company.

Q. There is George W. Sanborn & Son, two items, \$31,410.44 and another one for \$1041.60, \$32,452.04.

Do you know what that item of thirty-two thousand dollars to Geo. W. Sanborn & Son was?

A. It was for money advanced and for anything that he furnished in the shape of advances, funds and supplies or whatever it might be for the Kake Packing Company.

Q. Now, Mr. Kirberger, on the cans or on the goods purchased from the American Can Company of which Mr. Kendall was the representative as I understand you to say, or through whom you dealt, did Mr. Kendall—did he or didn't he receive a commission on those cans or machinery—whatever the Kake Packing Co. purchased from the American Can Company?

A. I couldn't—I couldn't say to that, Mr. Robertson.

Q. As to the fish, do you recall you testified yesterday that there was a contract or agreement for five years entered into with Mr. Sanborn and his son as selling agents?

A. Yes, sir.

Q. For the Kake Packing Company. Now, can you state, and if so please state, what was the commission that Mr. Sanborn and his son were receiving on all fish which they handled and sold for the Kake Packing Company?

MR. FULTON: That is in writing, isn't it?

A. Yes, sir, it is in writing in that contract.

MR. FULTON: Right in the contract?

A. In that contract; the contract is right there. I think it is 5%. Everybody knows that.

MR. FULTON: That contract is for the Court to consider. Q. Five per cent. Well, can you state, Mr. Kirberger, whether or not Sanborn & Son did receive that 5% on fish that was sold by them for the Kake Packing Company?

MR. FULTON: I object to that; not that we have any objection to going into it.

COURT: I suppose can assume they did; they have a contract and I suppose got the 5%.

MR. FULTON: I know they did; knowing Mr. Sanborn, whatever they sold, they hung onto. It is simply immaterial.

COURT: No question about that. If you want to know if that 5% is any part of that \$30,000 you can ask that.

Q. Now, Mr. Kirberger, this thirty-two thousand on account here on the statement, with George W. Sanborn & Son, \$32,452.04, can you state of your own knowledge at this time whether or not there is included within that amount, and if so how much, any moneys to the Sanborn Cutting Company under the agreement by which they were selling agents for the Kake Packing Company?

A. Yes, sir.

Q. Now, Mr. Kirberger, did you ever have occasion to have any conversation with Mr. Kendall or Mr. Sanborn relative to the Sanborn Cutting Company?

A. The only conversation that I had with Mr. Kendall in regard to that company was that at about the

conclusion of the operation of the Kake Packing Company for the year 1913, they contemplated making some changes in the Sanborn Cutting Company in regard to taking over the holdings or something like that—to that effect, and it was at that time that Mr. Kendall didn't feel as though they wanted to put up any more money for the Kake Packing Company at that time. That was the only conversation I had with Mr. Kendall directly on that subject.

MR. ROBERTSON: I would ask counsel at this time—I understand in his opening statement he admitted that F. P. Kendall and George W. Sanborn were the sole owners of the Sanborn Cutting Company, and were the officers and directors of the Sanborn Cutting Company on May 11, and May 12, 1914.

MR. FULTON: That is in the record already.

MR. KIRBERGER CONTINUING:

I was in Astoria on May 11, 1914, to attend a meeting of the stockholders of the Kake Packing Company with relation to considering any deal that might be before the company or in regard to the financial condition of the Kake Packing Company, and discussing matters pertaining thereto in general, and also with the idea of making a transfer to the Sanborn Cutting Company. Different things came up like that.

Q. Now, you said, Mr. Kirberger, that you met at that time for the purpose of considering an offer of the Sanborn Cutting Co.?

A. Yes, sir.

Q. To take over the assets of the Kake Packing Company?

A. Yes, sir.

Q. Now, who, Mr. Kirberger, were conducting the negotiations on behalf of the Sanborn Cutting Company?

A. Mr. Sanborn and Mr. Kendall, I think.

Q. Was there anybody else?

A. I don't think so.

Q. Well, were you pretty familiar with the matters taking place at that time?

A. As far as the transactions were concerned; as far as the things that we did right there that day, I am quite familiar.

Q. What I mean is this, Mr. Kirberger: On any of these occasions were you present at any meetings where there was somebody else than Mr. Kendall and Mr. Sanborn on behalf of the Sanborn Cutting Company?

A. No, sir. On that date it was suggested that the Sanborn Cutting Company take over the assets of the Kake Packing Company and all the members that were there, excepting I think Mr. Fulton was not present—that is he was the only one absent; all the rest of the members were present and we voted to transfer the assets of the Kake Packing Company over to the Sanborn Cutting Company. This is the document that was executed in accordance with such resolution. It was acknowledged by me before Mr. Fulton. (Here witness produced deed.)

Thereupon counsel for plaintiff after due proof of said instrument offered the same in evidence and the

same was received and read in evidence, and is hereunto attached marked Plaintiff's Exhibit "64" and made a part hereof.

The Kake Packing Company on that date did not receive from the Sanborn Cutting Co. \$72,621.01, and so far as I knew never received that sum or any part of it. About a month prior to that meeting I went north, and returned for that meeting a month later, and I don't know whether I have seen the books of the Kake Packing Company since. Perhaps I did. At the time of making the transaction, that is the sale of the assets of the Kake Packing Co., there was no money, check or draft passed and nothing to my knowledge was ever paid to the Kake Packing Co., and I was present all the time.

Thereupon counsel for plaintiff handed said witness a document and asked him the following question:

Q. You recognize the paper?

A. Yes, sir.

Thereupon counsel for defendants objected to the instrument being received in evidence unless accompanied by the resolution adopted and passed by the stockholders of the Kake Packing Co., and also the resolution of the Board of Directors referred to in the instrument. Thereupon the record books of the meetings of the stockholders and directors of the Kake Packing Co. were produced and the witness identified pages 31, 32, and 33 of the records of the meeting of the stockholders of the Kake Packing Company held May 11, 1914, and of the Board of Directors held at 2:30 P. M. of the same day, as the resolution referred to in the deed.

Thereupon said deed was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "65," and made a part hereof, and the minute book of the Kake Packing Co., and particularly pages 31, 32 and 33, were also offered on behalf of the defendants, and received in evidence with said deed, and the same are hereunto attached, marked Defendant's Exhibit "A" and made a part hereof. Page 30 offered, received and marked as Plaintiff's Exhibit "66."

Interrogated by Mr. Robertson:

Q. Is that your signature?

A. Yes, sir.

Q. Is that Mr. George W. Sanborn's signature?

A. Yes, sir.

Q. Now, Mr. Kirberger, this is May 11, 1914. Has the 125 shares been transferred to you since that date that you assigned them over?

A. No, sir.

Q. Looking at page 30, will you state if you know what that is? Do you recognize that?

A. Yes, sir, I do.

Q. What was that?

A. That was a statement of the Kake Packing Company, dated March 21, 1914, that is made up on that date. I was East at that time. I arrived back to Astoria on March 21st, or a day or two before that, and in the meantime some of the canned salmon had been sold; some of the pickled salmon had been sold, and there was a slight difference in some of the stock.

Q. Now, look at this plaintiff's Exhibit "63," then the assets between those dates, of the Kake Packing

Company, according to the inventory, had been reduced from some eighty-five thousand to the sum shown there, which is how much

A. Seventy-six.

Q. Thousand?

A. Yes, sir.

Q. And the liabilities, not including in either statement, as I understand it, this account of merchandise which you had assigned to Mr. Kendall and Mr. Sanborn?

A. No, sir, it was not included.

Q. Had been reduced during that time from some seventy-eight thousand to how much shown there?

A. Seventy-six thousand three hundred.

Q. No, their liabilities.

A. \$72,621.01.

MR. FULTON: Before page 30 is received—I have no objection to it, but I would like to clear up the matter. That statement on page 30 you read contained the indebtedness which the Sanborn Cutting Company assumed and agreed to pay as part consideration for the transfer, was it?

A. Yes, sir.

MR. FULTON: And that shows an indebtedness of \$72,621.01 according to these items here.

A. Yes, sir.

MR. FULTON: That did not include the store account of the Kake Trading & Packing Company?

A. No, sir.

MR. FULTON: They were not to pay that as part of the consideration?

A. I had it already assigned.

MR. FULTON: I say were not to pay that?

A. Nothing ever said about that; nothing ever mentioned about it.

To this question, Mr. Crossley, attorney for plaintiff, objected upon the ground that the same was irrelevant, immaterial and incompetent.

MR. FULTON: The gentleman says it is not material in this case whether paid or not. I think the gentleman's law is good.

MR. KIRBERGER:

Interrogated by Mr. Robertson:

Q. Now, I will ask, so there wont be any mistake: The property described in this deed, Mr. Kirberger, the real estate, is that the same property in the patent?

A. Yes, sir.

Q. Is that the same property that was conveyed prior to that time by the Kake Trading & Packing Company to the Kake Packing Company?

A. Yes, sir.

Q. In the deed which was not put in evidence, but which defendants' counsel concede was made February 29, 1912?

A. Yes, sir.

Q. And is that the same property, the same real estate for which the \$1750 was charged back on the

books of the Kake Packing Company as a debit against the Kake Trading & Packing Company?

A. Yes, sir.

Q. Mr. Kirberger, was there any meeting held of the Board of Trustees of the Kake Trading & Packing Company for the purpose of considering the execution of this particular conveyance to the Sanborn Cutting Company?

A. Nothing only what shows there in the books, of the Kake Trading & Packing Company.

Q. Did the Kake Trading & Packing Company, on May 11th or May 12th, whatever date this was made—May 12, 1914, or at any other time, receive the sum of ten dollars or any portion of that sum for the making of this conveyance?

A. Well, I can't recall received it personally; if I did I don't remember the fact.

Q. Well, is there anything on your books?

A. No, sir, nothing on our books to show, nothing on the books of the Kake Trading & Packing Company to show. The books are here, and you can examine them and look them over.

MR. ROBERTSON: Will counsel admit that \$72,621.01 or \$81,000 or either of those sums or any other sum was never paid to the Kake Packing Company?

MR. FULTON: What is the use of asking such a foolish question. Of course we don't admit it. It was paid to the Kake Packing Company—eighty-one thousand and whatever the amount it was paid to the Kake

Packing Company by the Sanborn Cutting Company. While the money wasn't taken out of the pockets of the Sanborn Cutting Company and put in the treasury of the Kake Packing Company, it was paid at the request of the Kake Packing Company, going to the creditors of the Kake Packing Company, and was exactly the same thing.

MR. ROBERTSON: I understand there is no claim that the seventy-one thousand was paid over, but you claim you paid the debts of the concern equal to that amount?

MR. FULTON: Absolutely.

MR. ROBERTSON: To get it clear myself: I understand that the defendants admit that the actual cash amount of \$72,621.01 or \$81,117 and some cents, or either of these sums was not paid to the Kake Packing Company in cash or notes or any other. * * *

COURT: I understand their contention is that they paid the debts; they assumed and paid the debts of the concern to that amount.

MR. ROBERTSON: With checks of the Sanborn Cutting Co.?

COURT: I don't know how paid; whether paid by checks or coin; it doesn't make any difference how they paid the debts.

MR. FULTON: Paid in coin of the realm.

MR. CROSSLEY: Never paid to the Kake Packing Company itself.

COURT: No, never paid to the Kake Packing Company, but paid its debts; they claim they agreed to.

MR. FULTON: They did pay its debts. Of course, our contention is that the legal proposition would naturally follow that statement of facts, that the payment was made to the Kake Packing Company.

COURT: I understand.

MR. FULTON: Of course, your Honor understands; the legal proposition would be the payment to the Packing Company, of course; not actually for it was paid to the creditors.

MR. ROBERTSON: The proposition we say is this: Of course we are not in position in our case in chief to say as to what checks or moneys they did or did not pay out to the various creditors, but we are in position at this time—we believe by taking the Kake Packing Company's books we can show the Kake Packing Company never received this money or never distributed it. If the Sanborn Cutting Company distributed that money, it is for them to prove it.

COURT: I understand that is what counsel intends to do.

MR. ROBERTSON: I just want that thoroughly understood.

MR. FULTON: Don't you know, Kirberger, as a matter of fact, that the Sanborn Cutting Company did pay this indebtedness of the Kake Packing Company?

A. Why—

MR. FULTON: Don't you know, as a matter of fact, they did?

A. Of course, I went away from there after that. I don't know a thing about what happened since that time, but I know that was the intention.

MR. FULTON: Don't you know they did it?

A. Well, I have no—I can't tell whether they did it or not, because I went away since that. I haven't been up there all the time. I don't know whether they did or not.

MR. FULTON: You called for the books of the Kake Packing Company; they were there at your service at any time you want them, all of them.

MR. ROBERTSON: I understand counsel admits what I was asking.

MR. FULTON: I don't admit what you said; not by a long ways.

COURT: I understand it was admitted that no money was paid by the Sanborn Cutting Company to the Packing Company in this transfer, but they agreed to pay and discharge certain debts in consideration. Whether they have done so or not is another question.

MR. FULTON: I don't agree we didn't pay it.

COURT: You agree you didn't pay the coin to the Packing Company.

MR. FULTON: We paid the coin to the Packing Company by paying their debts.

COURT: By paying their debts.

MR. ROBERTSON: But was no transfer of actual money from the Sanborn Cutting Company, to appear on the books of the Kake Packing Company, so the Kake Packing Company distributed that fund.

MR. FULTON: It is as plain as possible. We paid the Kake Packing Company eighty-one thousand and some odd dollars by paying its indebtedness.

COURT: I don't think there is any misunderstanding between you, or ought not to be on that condition of the record.

MR. FULTON: No.

MR. CROSSLEY: Just a question whether we should introduce the books of the Kake Packing Company to show no transfer of funds.

COURT: You need not do that; that is admitted.

Q. Now, Mr. Kirberger, with reference to the condition of the Kake Trading & Packing Company on January 6, 1914, I understood you to tell the court yesterday and the day before that you had been receiving a great many demands from creditors for the payment of bills up to that time?

A. Yes, sir.

Q. And that you hadn't paid them?

A. No, sir.

Q. Now, did you right in that particular date, by any perchance make out a statement of the Kake Trading & Packing Company?

A. No, sir.

Q. Now, will you look at this statement and see whether or not—state whether or not that was made up from your books?

A. Yes, sir. I recognize the amount as being amounts taken off the ledger.

Q. Now, is that a true and correct statement to the best of your knowledge and as far as you are able to say at this time of the assets and liabilities of the Kake Trading & Packing Company, on January 6, 1914?

A. Well, according to the—Yes.

Q. You have listed here, Mr. Kirberger, under assets, store property, beach property, furniture and fixtures, cash on hand, inventory, equipment, accounts receivable. Now, you haven't included in here then the 125 shares of stock?

A. No, sir.

Q. Of the Kake Packing Company?

A. No, sir.

Q. Nor the store account?

A. No, sir.

Q. Of \$10,333?

A. No, sir.

Q. Due from the Kake Packing Company to the Kake Trading & Packing Company?

A. No, sir.

Q. And in the values fixed by you there of the property, are those book values, I mean in the sense of the way you carried it on your books, or in your knowledge were those the actual values?

A. Well, I couldn't—there is a depreciation there on every inventory with regard to real estate and prop-

erty and furniture and fixtures. The only thing that don't depreciate is cash on hand. That is the amount we carried it on our books, the inventory value, and if there is any depreciation that is up to you to decide that—what it is.

Q. You don't show any depreciation?

A. Don't show any depreciation there whatever.

Q. For instance, if you paid for something—say \$100.00 for some article several years before that, you would still show its value \$100.00. Is that true?

A. Yes.

Q. Unless it had been entirely charged off; then it would not appear at all. Is that it?

A. Yes, sir.

Q. Now, you have a sum here of accounts receivable, \$4641.40. Now, will you look at this paper entitled Kake Trading & Packing Company, accounts receivable, January 6, 1914, and state whether or not that is an itemized statement of the accounts receivable on that date?

A. It is, sir.

Q. Now, were these accounts receivable carried on your books regardless of the account—I mean in the sense of whether the account was—the debtor was deceased or the place gone out of business?

A. Well, of course, there are a great many accounts you think are all right, but when you go to collect them they don't come through and there are a few accounts on there, where the people have died, and yet the account has remained there on account the estate has not been settled. There were some differences and perhaps

there was a good many of these accounts that never will be collected, but we have never taken them off the books; we thought there was a possibility and if we charged them off altogether we would lose track of them.

Q. Do you feel that taking these accounts from your experience—who are the class of people on there mainly? I mean are they white people?

A. They are Indians and fishermen; Indians and white people.

Q. Now, from your knowledge of such accounts against that class of people during the years that you have been in Kake, are you in position to state—give an estimate as to the percentage that would not be—under ordinary circumstances—recovered on these accounts, reasonably?

A. I think perhaps we could get 50% of them all right enough, although I think that the Indians' accounts there are better than the white people's accounts. I would be more sure of collecting the Indian accounts than I would the white people.

Q. Well, now the Admiralty Trading Company account. Is that account good?

A. It is not.

Q. Why not?

A. Because the company has dissolved.

Q. The sloop "Anna," what has become of that account?

A. The man is dead.

Q. Any way of getting your money?

A. I couldn't say as to that, Mr. Robertson. I don't think the chances are very good.

Q. It hasn't been paid yet?

A. It hasn't been paid yet.

Q. Tommy Austin?

A. That is good.

Q. Joe Anderson?

A. That is doubtful.

Q. L. Bayers?

COURT: Won't it be sufficient to let him state what he thinks should be discounted on the entire account, without going through it?

MR. ROBERTSON: Very well; I prefer to do that.

MR. FULTON: He said 50%.

COURT: He said 50%.

Q. You think, Mr. Kirberger, it would be a fair statement, instead of \$4641.48 as the accounts receivable, that the actual value should be about half of that on this statement?

A. Well, I think if it comes down to a show-down to be sure of getting—if I was to bank on getting that amount there, I would say 50%; I would be lucky to get it.

Q. Now, Mr. Kirberger, turn to page 5 of your ledger—first I will ask you, Mr. Kirberger, if those are the books of the Kake Trading & Packing Company, kept in the ordinary course of business either by yourself or under your supervision?

A. Yes, sir.

Q. And to the best of your knowledge are they correct?

A. Yes, sir.

Q. Mr. Kirberger, turn to page 5; what entry is shown on page 5?

A. Store property.

Q. And what is the book valuation that you carry the store property

A. \$3055.03.

Q. And is that carried that way for a number of years or how is that? I mean is that the valuation that has been carried for a long time on that store property?

A. It has been carried quite a number of years; has been some depreciation, I think, put on to that, but it has been carried that way, but I think it could stand considerable cutting yet as the store property certainly should decrease in the past.

Q. Now, from your knowledge of such properties, are you able to state what would be the real value of that property, instead of just the book value?

COURT: What date are you referring to?

Q. On January 6, 1914, Mr. Kirberger.

A. Well, it wouldn't be any more than that.

Q. Well, would it be less

A. It might be less; it could stand a cut as far as that is concerned.

Q. Well, how much less do you think it should be, Mr. Kirberger, so we can get at it?

A. Well, we could cut \$500.00 off from it safely.

Q. Now, will you turn to page 7, Mr. Kirberger, and see what you have there

A. It is property, house and lot on the beach, small cabin; two room house.

Q. Is that the property you designate in this item as beach property?

A. Yes, sir.

Q. What did you carry there as valuation in the books

A. \$250.00.

Q. And when did you first acquire that property?

A. 1900.

Q. In 1900?

A. Yes, sir.

Q. Is \$250.00 the price paid for it at that time?

A. Yes, sir.

Q. And you carried all these years at that valuation?

A. Yes, sir.

Q. Had the property been improved during that time?

A. Nothing on the house; the garden has been cultivated every year.

Q. But no actual improvements put on?

A. No actual improvements made on the house.

Q. What was the actual value of that property then on January 6, 1914, if you know?

A. Well, the values up in that country are a pretty hard proposition to determine. One man might pay \$300.00 for that and another man might come along and wouldn't pay over \$100.00; no intrinsic value—no fixed value up there. A pretty hard thing to decide.

Q. Have you any offer for it?

A. No, sir, would be glad to take \$100.00 if I could get it.

Q. Very well, just state to the Court what you consider the real value of that property, the beach property if you think it is not worth anything—if you think it is worth a thousand dollars; just tell the Court what the real value is as near as you are able to tell.

A. Well, I think it would be worth \$200.00.

Q. \$200.00?

A. It would be worth that much to me to rent out to somebody for—

Q. Now, turn to page 10, Mr. Kirberger, of your ledger. What account do you carry there?

A. Store furniture and fixtures.

Q. Furniture and fixtures; what valuation do you carry it at on your books?

A. \$745.70. That was not at that time, though.

COURT: January 6th?

A. January 6th.

Q. January 6, 1914, that is.

A. About \$570.00. \$571.35.

Q. Now, in regard to furniture and fixtures, Mr. Kirberger, is that really the cost price of them?

A. Yes, sir.

Q. And is it regardless of how old they were?

A. Yes, sir.

Q. Or what depreciation?

A. Yes, sir, regardless of that.

Q. What would you say on January 6, 1914, was the real value of the furniture and fixtures, which you carried at a book value of \$571.35?

A. Well, 50% off would be all right.

Q. You think 50% off?

A. Yes, sir.

Q. Some of that is simply home made furniture?

A. Made mostly there.

Q. Most of it home made?

A. Except writing desk and scales, things like that.

Q. Now turn to page 89, Mr. Kirberger.

A. We don't have that kind of number here. It would have to go under named items.

Q. I meant wherever you carry Cash.

A. Cash—that is in the cashbook.

Q. Then I will look that up a little later. Turn to page 9.

A. Yes, sir.

Q. What is that?

A. That is equipment.

Q. Now, what did you show as your book value on January 6, 1914?

COURT: Haven't you a summary of those that this witness made up from the book?

MR. ROBERTSON: No, sir, this is what he made last evening.

COURT: He testified a moment ago he didn't make it.

MR. ROBERTSON: I think your Honor, he meant he didn't copy or typewrite it.

COURT: The statement was made up by him?

MR. ROBERTSON: As far as the figures, Mr. Kirberger made them up.

COURT: If he made up the statement from the books, and the books are now in evidence, he can testify as a result of his examination, to the summary, but the books must be here so other people can examine them.

MR. ROBERTSON: We have the books here.

COURT: Very well; let him take the summary and go through with it.

Q. Just tell the court, Mr. Kirberger, so we can clearly get it as to how you made up this statement, that is as to who assisted you in it and what you did.

A. Mr. Paine, the Trustee, assisted me in going over the books and making out this statement under my instructions, in regard to the values to the best of my knowledge and belief, what they contain.

Q. Now, then, we will look at this again.

A. There is absolutely nothing irregular about that statement in any shape or form.

MR. FULTON: How could you go back? These books run up to what year, this book you are testifying to?

A. Run up to January 6, 1914.

MR. FULTON: I mean the books from which you took that statement. You are just testifying about this book

A. Yes, sir.

MR. FULTON: That covers what period?

A. That covers the period.

MR. FULTON: The book, I am talking about the book. Turn that paper over and forget about it.

A. Yes, sir.

MR. FULTON: Now, what period does the book cover?

A. The books cover up to date; up to the time the bankruptcy happened.

MR. FULTON: From what year?

A. Why, from 1904.

MR. FULTON: 1904—

A. That with other books went along with it; this is the last ledger we used.

MR. FULTON: 1904 to May 9, 1915?

A. May 9th—

MR. FULTON: April 9, 1915.

A. April.

Q. To the date of bankruptcy?

A. Yes, sir.

MR. FULTON: How could you go through those books there and tell how much the building was in 1904? How could you do it?

A. How could I do it? Why the easiest thing in the world. All you have to do is to take the amounts here; they are right here; and accounts receivable, all you have to do is to take them off; they are black and white there; you could do it yourself. I worked on it last night until midnight taking off accounts. You can examine; I don't think there is any irregularity about it.

MR. FULTON: You may be right but I would just like to have you show me one account in there that shows what the indebtedness was on January 6, 1914. Just one of them, then I will probably understand. Just name one account now. I am curious to know how you can pick out a day, say January 6, 1914, and say how your books stood on that particular day; any one account, and show how you do it.

A. Well, J. D. Byers.

MR. FULTON: Turn to it.

A. What he owed the company?

MR. FULTON: On January 6, 1914.

A. All right; there is his account right there, J. D. Byers, February 10, 1913, \$438.89.

MR. FULTON: How much was it on January 6, 1914?

A. Just the same.

MR. FULTON: Just the same?

A. Just the same; no difference.

MR. FULTON: Included in this statement of yours, is there any large number of accounts that continued along?

A. Yes, sir, but Mr. Fulton, they go up to that date. You see on your ledger here; you can tell right here; for instance, we will get an operation account; for instance, this following one I can use, down here: December 31st. Then we took the ledger balance on December 31st up to January 6th, determined that and took the credits on the other side if there was any up to that date.

MR. FULTON: How would you find the value of your stock on that date.

A. We had an inventory taken at that time; just happened it worked out all right.

MR. FULTON: Have you your inventory here.

A. That is, up to date February, '14.

MR. FULTON: Where is the inventory? Have you the inventory here?

A. I unfortunately left the regular inventory back home.

MR. FULTON: That is what I say.

A. Yes, sir, but I have a statement showing that inventory though, the amounts.

MR. FULTON: Where is your statement? That is what I want to see.

A. You have it there, Mr. Robertson.

MR. FULTON: We don't have the inventory itself?

A. I forgot it.

MR. FULTON: I don't question your honesty.

Q. (Mr. Robertson) What statement is this, Mr. Kirberger?

A. I want to show him that inventory, or that statement there along in February, 1914.

MR. FULTON: You don't have the inventory then?

A. The book containing the items?

MR. FULTON: Yes.

A. No, sir, I unfortunately forgot it. That is all. I didn't think we needed it.

MR. FULTON: I suppose the court will know how much it is worth.

COURT: You can proceed with the testimony. The summary is here and you can cross examine him about it later if you want to.

Q. (Mr. Robertson) Now, Mr. Kirberger, I think you explained to the court then that you, with the assistance of Mr. Paine, had gone over your books?

A. Yes, sir.

Q. And as I understand this statement, why you don't claim that there isn't—possibly there might be error in it but to the best of your knowledge it is correct?

A. Best of my knowledge and belief; might be an error there, small error, but couldn't be a very big one at that, because I am quite familiar with the accounts.

Q. Now, in the assets, there is no statement whatever of what they call the Pt. Barrie property. Why wasn't that put under the statement of assets?

A. Well, I will tell you. The Pt. Barrie property was a salting location that we owned in 1900—along in 1900 and 1901, and it was simply a salting location containing a cooper shop, a store building, and a few cabins and a dwelling house, where we salted salmon for a couple of years. After that we moved the equipment from Pt. Barrie to Kake; and the Pt. Barrie property is located under the Trade & Manufacturers Act in 1898, by Cyrus Orr, and we afterwards purchased Cyrus Orr's

rights and holdings there, as they have the papers to show, and in 1902, we moved the salting equipment to Kake, and operated there the entire place, and this Pt. Barrie property at that time—it is located close to a red salmon stream, the only one around that section of the country for a good many miles, and we considered there might be a possibility of a canning site there on account of the title, that could be acquired later, and we put—when we incorporated the company, why, Mr. Burwell, he owned the entire holdings there, and he included that Pt. Barrie property in his assets, but when he turned it over to the Kake Trading & Packing Company, the whole thing, he excluded that; he eliminated the Pt. Barrie property from it; for that matter an individual or a citizen couldn't own or control more than one location in order to get a patent. Therefore, we eliminated Pt. Barrie from our bill of particulars there, and at the present time that site is chiefly valuable in its title only. If we could get title to that, it would acquire value right away for it would be a good cannery site perhaps; but outside of that the buildings have all been taken away; the Indian fishermen have stolen all the lumber off it; and it wouldn't pay keeping anybody down there operating this place. The results are there isn't a thing there now, a couple of cabins perhaps in a little bay back from this point, and as far as any value to be placed on that property is concerned, there is no value to it other than what rests in that title.

Q. But you always carried it on your books with a book value of \$5000.00?

A. We always carried a book value figuring if it

was worth anything at all it was worth that much money, and we carry it in our corporation under that amount, \$5000, at the present time. We probably couldn't get fifty cents for it.

Q. But you carried at that valuation, a book valuation in the schedule of the corporation, of its assets, at the time it was adjudicated a bankrupt?

A. Yes, sir.

Q. But you don't consider that it has any real value?

A. I don't consider it worth while putting it in there.

Q. Now, that statement you made to the court, did that apply to January 6, 1914?

A. Absolutely, sir.

Q. Cash on hand; that is the actual amount of cash on hand, that it had at that time?

A. The books show the company had that on hand at that time. That is as far as I can go—can go no further than that.

Q. No, I know; that is all right. Now, that is \$1451.00?

A. Yes, sir.

Q. Now, you recall that you told the court you were having a rather hard time to pay your bills at that time?

A. Yes, sir.

Q. Now, will you explain how it would happen that on January 1, 1914, or January 6, 1914, you would have that sum of money and still have difficulty to pay your bills; explain how that matter comes up.

A. The fact of the matter is this: The only time there is any heavy amount of business done there in the winter time is during the months of November and December, when all the Indians are in the village celebrating their festivities, and that is the time—if they spend any money, they spend in the winter months through November and December, and if there is any money to be received, that is any large amount, it would be received at that time, or in December after Christmas, between Christmas and New Years. Now, there is one boat that plys between Juneau, where we do our banking business at Kake, once every two weeks, and we can't afford to send the money up there by the mail boat frequently because at times it is so irregular, that is in bad weather I don't know whether the boat is going to make it or not, and we keep hoarding this money up, figuring sometime we would get up with it ourselves to bank, and make our deposits. For that reason it happens to be \$1451.00, at that time.

Q. That is abnormal, as I understand, an abnormal situation in reference to the cash?

A. Yes, I don't think it was very much cash at that.

Q. Now, inventory estimate, \$7000; now, just tell the court whether, perchance on January 6th, 1914, you made an inventory. Did you or did you not, on January 6th, 1914? Was there an inventory made on that particular date?

A. January 6th?

Q. Yes.

A. No, not on that particular date.

Q. How, at this time, do you get that \$7000; you say that is an estimate. How do you mean? Do you think that is a fair estimate?

A. That estimate of \$7000, from the fact that the inventory that we did take shortly after that, on February 10th, was \$7667, and when I put it down there at \$7000, I think it would be a very conservative estimate, as far as the two amounts are concerned.

Q. But you didn't take an inventory —

A. And certainly it isn't any more than that—that is an absolute fact. The values there probably—we could stand cutting.

Q. And you don't wish the court to understand—

A. That it is inflated in any form, shape or manner.

Q. But you don't wish the court to understand you did actually take an inventory on that particular date?

A. Didn't take any on that particular date, no, sir.

Q. But that is simply your best estimate at this time?

A. Yes, sir.

Q. Now, the equipment, Mr. Kirberger. Equipment \$890.77. I wish you would just look at your page 9 of your book and see whether or not—when you wrote this down here, whether it is just the book value, and if so how much it would be lessened.

A. Equipment shows here \$890.70, on the books here.

Q. Now, on January 6, 1914?

A. Yes, sir.

Q. And is that the same amount that is carried from some other years?

A. Yes, sir, it is carried right along; material used is Skiff, \$2.80; square sterned skiff bought from Davis Brothers, \$40.00; that is our equipment.

Q. This sum doesn't include depreciation, does it?

A. It does not, sir.

Q. And \$890.70 represents the actual money you paid out?

A. Paid out for equipment.

Q. No matter how many years before?

A. Yes, that is the idea.

Q. Now, on January 6th, 1914, what would you say would be the real value of that equipment?

A. Well, in that equipment there, there is herring seine; that was inventoried I think at about \$400.00. That herring seine has been used since then two or three times, and if I could get a purchaser for it for \$75.00 I would be glad to sell it.

COURT: Confine it to January 6, 1914.

A. January 6th; that is the time it was used; that fall.

COURT: What fall?

A. The fall of 1913—and '14.

COURT: 1913?

A. 1913.

Q. What did you consider it worth January 6, 1914?

A. Well it had been five, practically—we have had it five years, but we used it only one year—two years.

Q. It was five years old January 6, 1914?

A. Yes, sir.

Q. And you had used it two years prior?

A. We used it two season.

Q. Prior to January 6, 1914?

A. Yes, sir.

Q. How much depreciation would you say would be in it? Still be useful?

A. Cut it 50% anyhow.

Q. What would you say was the real value of the entire item of equipment, \$890.70?

A. I would say \$400.00.

Q. Then you think it would cut more than 50%? You think \$400 would be a fair valuation?

A. Yes, sir.

Q. Now, you have already testified, Mr. Kirberger, you told the court that you considered the accounts receivable were worth 50%.

A. 50%.

Q. Now, you didn't include in here, Mr. Kirberger, as I understand it, the 125 shares of stock?

A. No, sir.

Q. Nor the amount the Kake Packing Company owed the Kake Trading & Packing Company?

A. No, sir.

Q. \$10,331.31?

A. No, sir.

Q. That is not included in the assets?

A. No, sir.

Q. And you wish the court to understand that if those two items should be included, you haven't put them in?

A. Yes, sir, that is the idea.

Q. Now, the liabilities; the accounts payable, Mr. Kirberger, did you go over?

A. Yes, sir.

Q. The accounts payable, to find what was owing at that time?

A. Yes, sir.

Q. And is that what it made up?

A. Yes, sir.

Q. How much?

A. You have it down here, eighteen thousand——

Q. No, that is not correct, because you have your figures here; there is the statement you made up, Mr. Kirberger. You better figure it now, before the court. I think you will find you had it right on the back of that first one.

A. It was \$18,145.89.

Q. Just mark that sum there if it is not already marked on the paper.

MR. FULTON: On January 6, 1914, eighteen thousand.

A. Yes, sir.

MR. FULTON: Aren't you getting it in '15 there?

A. No, sir.

Q. Then at that time, Mr. Kirberger, did the Kake Trading & Packing Company, on that date—was there an indebtedness due you from the Kake Trading & Packing Company?

A. At that time?

Q. Yes.

A. Yes, sir.

Q. What was that?

A. It is right here.

Q. You have it right on your paper here?

A. \$1466.29.

Q. Now, add these two amounts together and see what it is.

Q. Now, add up your assets here as you stated to the court what you thought the real value was.

A. You haven't these items correctly.

COURT: Didn't you make the statement yourself; didn't you make it up?

A. He has——

COURT: Not what he has; what you have; you made the statement?

A. Yes, sir.

COURT: Testify from your own knowledge.

Q. This is the valuation put on as you testified to the judge.

A. The stock isn't there.

Q. That should be put on there.

A. (Handing paper) I don't know whether added right or not.

Q. Now, then take the assets that you should on this paper at their book value they were worth \$17,849.54, but at the real value, according to your knowledge of the real value, on that date, January 6, 1914, they were worth \$14,316.53; and that the liabilities or accounts payable were \$18,145.89, and that there was—the Kake Trading & Packing Company owed you

\$1466.29, making the total liabilities at that time of the Kake Trading & Packing Company, \$19,612.18.

A. Yes, sir.

Q. I am reading directly from your figures, Mr. Kirberger.

A. Yes, sir.

Q. But as I stated before this statement of your assets doesn't include the Point Barrie property?

A. No, sir.

Q. Because you carried that on your books at \$5,000, but considered it had no real value at that date?

A. No, sir.

Q. And doesn't include 125 shares of stock in the Kake Packing Company?

A. No, sir.

Q. Which was assigned to Sanborn and Kendall on that date?

A. No, sir.

Q. Doesn't include the \$8582.00 account?

A. No, sir.

Q. Nor the \$1750.00?

A. No, sir.

Q. Well, the \$8500 account was assigned to Sanborn and Kendall on that date.

MR. ROBERTSON: We now offer this in evidence, if the court please.

COURT: According to that the Trading Company was in fact solvent at that time?

MR. ROBERTSON: How is that, your Honor?

COURT: Assets \$14,316.53, and the Packing Company had eight or ten thousand dollars; that makes \$24,000 of assets and liabilities nineteen thousand; so under that statement, it was in fact solvent.

MR. ROBERTSON: Prior to these transfers, yes, sir, but of course our theory is that the defendants wouldn't have a right to fix it, or to use as assets something that by their own wrong doing, they are taking away from the property.

COURT: That question would probably arise, if the company solvent or insolvent.

Q. Mr. Kirberger, I call your attention to this statement, about which we were interrogating you just prior to lunch and will ask you whether or not at the lunch hour, you found in making the additions that you had made a mistake and it should be \$14,312 instead of \$14,316?

A. Yes, sir.

Q. And at the noon hour, then, did you make or have made a typewritten statement?

A. Yes, sir.

MR. ROBERTSON: And now, if the court please, I offer the same in evidence.

MR. FULTON: In your estimate revised, I believe you added to the statement of account, didn't you; list of liabilities—bills payable? While you are looking for it, you have cash on hand amounting to \$1451.41. Did you have any cash in the bank at that time in addition to this?

A. No, sir, that includes the cash in the bank.

MR. FULTON: Do you have your bank book here?

A. No, sir, I don't think I brought any bank books. I forgot. I didn't bring any bank books at all, Mr. Fulton. We have the cash book and the books there that shows that; the cash book is there.

MR. FULTON: The cash book would show the amount of money you had in the bank?

A. Yes, sir.

MR. FULTON: What?

A. Well, we have the cash included in that.

MR. FULTON: I understood you to say you had this cash on hand \$1451.41 up there; had a large amount of money on hand, actually in your possession up there, an extraordinary sum of money?

Q. That is according to the cash book, yes.

MR. FULTON: Well, did you have any money in the bank at that time, is what I am anxious to know. You ran a bank account, didn't you?

A. Yes, sir.

MR. FULTON: You said you did, I believe.

A. Yes, sir.

MR. FULTON: Said you banked at Juneau?

A. Yes, sir.

MR. FULTON: Had a pass book?

A. We don't have a pass book; have just a statement, a statement rendered at the end of each month.

MR. FULTON: Have you the statement rendered by the bank showing the amount of money you had in the bank at that time?

A. I couldn't say whether have it or not.

MR. FULTON: Look for it, will you. I understand this was the cash you had on hand. Was that your Honor's understanding?

COURT: That was my understanding.

MR. CROSSLEY: That was money in the bank.

COURT: No, the impression was that was the amount of money he had at the store because he hadn't had an opportunity to send it to the bank.

MR. ROBERTSON: I have the list of accounts receivable which I was talking about this morning.

MR. FULTON: Haven't a list of the bills payable?

MR. ROBERTSON: We had here this morning a list of the bills payable, and will certainly be very glad, as soon as I find it, to give it to you.

MR. FULTON: I will take it up later.

A. I have some statement, I think, over in my suit case.

COURT: Look them up in time for cross examination.

A. Here is the cash book.

MR. FULTON: That is satisfactory to me, your Honor. I would like to have a list of the bills payable

introduced with this if you have it here, and it seems to me I have a right to insist they should include a statement showing the names of the parties to whom owed, and the amount.

COURT: Yes, counsel can supply that later.

MR. ROBERTSON: I will if we have it, and I had it here this morning, and it must therefore be here or at my room at the hotel, and I will be very glad to bring it in.

MR. FULTON: Does your Honor allow that in now.

COURT: With the understanding that they complete it by putting in the list of bills payable.

Thereupon, counsel for plaintiff offered in evidence said statement, bill and inventory witness just testified about, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "67," and made a part hereof.

Counsel for plaintiff subsequently during the trial offered a list of bills payable, which are hereafter referred to, and are marked Plaintiff's Exhibit "67a," and made a part hereof.

Thereupon, counsel for plaintiff offered in evidence the record and minute book of the Kake Packing Co. of the meeting of the stockholders of such corporation of January 21, 1913, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "68," and made a part hereof.

Counsel for plaintiff thereupon offered in evidence a certified copy of the judgment obtained by plaintiff in the case of plaintiff herein against the Kake Packing Company, in the District Court for the District of Alaska, District No. 1, at Juneau, No. 1328-A, being the judgment set up in the suit against Sanborn Cutting Co. at Juneau, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "69" and made a part hereof.

After said Plaintiff's Exhibit "69" had been received in evidence, thereupon the following proceedings took place:

MR. FULTON: If the court please, as to this first document that counsel has offered in evidence, it is a copy of a docket entry, evidently of some kind of an entry in the District Court for Juneau. Of course, under no circumstances is that competent. Have you a copy of the complaint?

MR. ROBERTSON: That is a copy of the judgment. No attack on our complaint whatever.

MR. FULTON: I don't think any court would hold that competent, but when this case is tried, I want this issue tried; if you have a copy of the complaint upon which that judgment was entered and will attach it to this, I won't object to that, but I want the record here to show what this judgment was based on, so when the court passes on this case we will have it. I think we are entitled to it.

MR. ROBERTSON: The judgment is the identical judgment, and counsel can easily verify for himself, set up in case 1405-A, and which they in fact set up in their answer in this court where they endeavor to have us enjoined in prosecuting our suit in Alaska.

MR. FULTON: We plead a false and fraudulent judgment and you plead a valid judgment. I tell you what we will do: If you will agree that the judgment is based upon the claim of the Kake Trading & Packing Company against the Kake Packing Company, as shown upon the books of the Kake Trading & Packing Company offered in evidence here, I will stipulate that as far as the jurisdiction and power of the court to enter it, it is a valid judgment. I deny it is a judgment entered in good faith; I claim we owned that claim at the time; and this judgment is based upon the claim of the Kake Trading & Packing Co. as shown by the books of the Kake Trading & Packing Co., offered in evidence, including \$1750 which is shown by the books was to be paid back to the Kake Trading & Packing Co. in case we obtain a patent for the land. Is that correct?

MR. ROBERTSON: I will state what it is and you see if that is it: We are willing to admit to your Honor that this judgment is based upon a complaint wherein the plaintiff sued the Kake Packing Company for the recovery of an amount of \$10,333.31, which is the account shown on the books of the Kake Trading & Packing Co. against the Kake Packing Co. and in which \$10,333.31 is included the \$1750 item and the \$8582.21 item, and another small item of eight dollars, I believe,

which at this time, I am frank to say I don't just recall where that other eight dollars arose.

MR. FULTON: And this \$8500 includes the claim attempted to be signed over to Sanborn and Kendall.

MR. ROBERTSON: Yes, we admit; the identical claim as far as I know represented by this assignment put in evidence this morning.

MR. FULTON: And this judgment shall be of full force and effect as if the complaint and everything showing jurisdiction were attached; that is all right.

Thereupon counsel for plaintiff offered and there was received and read in evidence an execution issued upon said judgment and the same is hereunto attached, marked Plaintiff's Exhibit '70' and made a part hereof.

MR. ROBERTSON: Did you have your bookkeeper, Mr. Fulton, produce the books as to the profits that the Sanborn Cutting Company have made at the Kake Cannery since May 11, 1914.

MR. FULTON: Yes, I have what you call a balance sheet for two years, which I now hand you and will say we have never charged any interest at all on the moneys invested.

MR. ROBERTSON: I am not bookkeeper enough to know whether that is profit or loss, that ten thousand——

MR. FULTON: That is profit. The balance sheet for 1915, the profits accumulated by Sanborn Cutting

Company in its operation of the cannery of what was the Kake Packing Company, shows a profit to the Sanborn Cutting Company of \$13,893.36, and for the year 1914, a profit of \$13,911.83, not counting interest on our investment.

MR. ROBERTSON: I understand counsel admits these respective amounts stated by him are the profits made by the Sanborn Cutting Company on what is known as the Kake Cannery.

MR. FULTON: Its operation of the plant.

MR. ROBERTSON: The plant which formerly was known as the Kake Packing Company.

MR. FULTON: With such additions as they put on it.

MR. ROBERTSON: Does that charge any interest on the investment at all?

MR. FULTON: Why not let the statement go right in? The court can see what it is then. Why not offer the statement in? It doesn't make any difference to us though. Gives the court an idea of the enormous money it takes to operate a plant like that, and I think it should go in.

MR. ROBERTSON: Of course as far as we are concerned, if the court please, very naturally I don't feel like making on our behalf offers of what possibly is evidence for the defendants, although your Honor possibly might like to have these various statements.

Thereupon, counsel for defendants offered said document in evidence in connection with the conversation, and the same was received, and read in evidence, and is hereunto attached, marked Defendants' Exhibit "B," and made a part hereof.

KIRBERGER CONTINUING:

Since May 11th or 12th, 1914, the Kake Packing Co. has not operated at Kake, Alaska. The Sanborn Cutting Co. has been operating the cannery formerly owned by the Kake Packing Co. Here witness produced a letter from Mr. F. P. Kendall to himself, dated June 14, 1912, which counsel for plaintiff offered, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "71," and made a part hereof.

Q. I notice in this letter, Mr. Kirberger, that Mr. Kendall speaks of the fact that you are drawing down \$150.00 a month salary at the cannery—at the Kake Cannery—Kake Packing Company. Did you ever receive one cent of that salary?

A. Nothing only my expenses. Expenses on company business. I did not receive any of the salary.

Q. Now, when you made that assignment of your brother's stock, or guarantee of your brother's stock, and turned over the sixty shares to Messrs. Sanborn and Kendall on January 6, 1914, did you have a power of attorney from your brother?

A. No, sir.

CROSS EXAMINATION

Interrogated by Mr. Fulton:

Q. I notice in looking over the records of the minutes of your various directors' meetings of the Trading Company that you held no meetings of either the stockholders or directors for about four years.

A. The reason was, Mr. Fulton, that in 1912, after we did have that meeting February 29th, I went immediately—I was busy in Seattle and after that meeting I went to Kake, and when I returned after the season's operations, I went through to Astoria, and I just simply neglected it; that is all. Neglected having the meeting, and the same way in 1913. It was a matter of neglect on my part because I was concentrating all my energies with the other concern, and I kind of forgot it; that is all. Simply neglected it.

Q. Did you make a statement to your stockholders at any time concerning the affairs of the company?

A. Of the Kake Packing Company?

Q. The Trading Company.

A. Yes, sir, they were familiar with it. They knew everything we were doing anyhow. Mr. E. B. Burwell, a stockholder, was adjudged a bankrupt in 1912 or 1913—I do not remember. The other stockholder, Mr. Seth H. Morford, is in the fire and marine insurance in the Coleman Building, Seattle, of the firm of Burwell & Morford. I met Mr. George D. Emory in 1915—in the winter of 1915—just about the time we held the last meeting of the stockholders of the Trading Company. He is an attorney at law. I met him through Mr. Bur-

well and Mr. Morford, I think. I think I met him some days before March 17, 1915. I do not think he was attorney for the creditors of the Trading Company. He did appear as one of the attorneys for the Trading Company in the bankruptcy proceedings, and was the attorney who prepared the bankruptcy proceedings. I think Mr. Robertson, of the firm of Gunnison & Robertson, was attorney for the creditors.

I was acquainted with Mr. Emory for two or three weeks before the Kake Trading & Packing Company was adjudged a bankrupt, but never did any business with him. The only business transaction that I had with him, to my knowledge, is when he appeared as one of the stockholders in the Kake Trading & Packing Company in the meeting of March 17, 1915. I came down to Seattle in January, 1912, and had with me a prospectus that I had prepared in 1910 and 1911. I did not have with me the 1903 prospectus. I brought the prospectus with me because I figured to get into the canning business that year. I expected to get some of my people in the east in it. I think I had been in Seattle a week or ten days before January 31st, 1912, the date of the telegram I received from Mr. Kendall.

I was not successful in getting any one interested in Seattle. At that time, I had not been successful in getting anybody in the east interested in the enterprise. I was not taking it up with any one in Seattle. I had no intention of buying any machinery or anything at all, until after the organization was completed, but I was just simply looking around and getting information on

machinery, as we figured on a new line of machinery, the sanitary line; the other line we figured was soldered line. This is the telegram that I sent to Mr. Kendall, and which Plaintiff's Exhibit "14" is in response thereto.

Which telegram was then offered in evidence and read into the record, and was and is as follows:

"Seattle, Wash., January 31, 1912.

F. P. Kendall,

c| American Can Co.,
Portland, Oregon.

Contemplate purchase sanitary line; when will you be Seattle? Answer. Ernest Kirberger, Hotel Frye."

Q. As a matter of fact you were not contemplating the purchase of any cannery machinery. You were simply making inquiry as to how much it cost?

A. Well, we were figuring; of course if we completed arrangements we would buy.

Q. But you told me that you had not succeeded in interesting anybody either in Seattle or in the east?

A. I hadn't succeeded in interesting anybody definitely, but was figuring.

Q. But when you sent that telegram and told Mr. Kendall that you were contemplating purchasing sanitary line, you had no such thought in mind, for the simple reason you had no organization back of you at all? And then you stated a minute ago that you were not in the market, but you wanted to find out the value so you first started with him; you sent a telegram that wasn't the truth, didn't you?

A. I don't figure it so.

Q. This Kake Packing Company was organized in good faith, wasn't it?

A. Yes, sir, absolutely. I was very anxious to have it organized. I was the man that came down and interviewed both Mr. Kendall and Mr. Sanborn. I didn't urge them to go into it.

Q. You had this beautiful prospectus of yours?

A. Yes, sir, I had that then.

Q. And you enlarged naturally upon the beauties of the situation and its eminent fitness for a cannery at that time?

A. Yes, sir.

Q. And you honestly, sincerely and truthfully believed it was a good investment?

A. Yes, sir, I believed it.

Thereupon counsel for defendants offered in evidence the entire record of the minutes of the stockholders and directors of the Kake Packing Company, and the same was received and read in evidence, and is hereunto attached, marked Defendant's Exhibit "D" and made a part hereof.

KIRBERGER CONTINUING:

That is my signature on page 24 of this record, Defendant's Exhibit "D," as President of the corporation. I read that record before I signed it.

MR. FULTON: I desire to read this portion of it—a meeting of the board of directors held February 20, 1912: "On motion Mr. Ernest Kirberger and Mr. George W. Sanborn were instructed to obtain lowest

prices on and purchase all machinery, tools and fixtures, including lumber for building, arrange for freight and Chinese contracts, and to do whatever other business is required to be done to start in immediate work, such as erecting buildings, putting in machinery, and purchase of the necessary supplies and material required for the season's work of 1912."

KIRBERGER CONTINUING:

It was pursuant to that resolution that I went back to Kake. I superintended the construction of the buildings there, and after the buildings were constructed, I was general manager and superintendent of the cannery during the years 1912 and 1913. During the year 1912, our trial balance shows that we lost fourteen hundred and some odd dollars, and at the end of the season of 1913 we were pretty badly in debt, and I had identified myself with the industry, and likewise had Mr. Sanborn and Mr. Kendall.

Q. Outside of your own individuality and the individuality of Mr. Sanborn and Mr. Kendall and Mr. Gordon, the Kake Packing Company had no great outside men that were backing it, did they?

A. No, sir.

Q. When did the season close for 1913?

A. About October 13, I think.

Q. And when did your reports of the full operation get to Astoria, about?

A. I don't quite understand, Mr. Fulton.

Q. Well, at the end of the season naturally you made a report?

A. We did that at the home office.

Q. That is at Kake?

A. No, sir, Mr. Sanborn's office.

Q. From what did you make that?

A. We made that from the books down there.

Q. Who kept the books down there?

A. Mr. Snell.

Q. During 1912 and 1913, where was he when he kept them?

A. The books—at Kake, at the cannery.

Q. Were the books brought down?

A. Yes, sir.

Q. At the end of each season?

A. Yes, sir.

Q. Mr. Snell was bookkeeper?

A. Yes, sir.

Q. For 1912 and '13?

A. Yes, sir.

Q. Then when were the books brought down to Astoria in 1913?

A. About October 13th or 15th; thereabouts.

Q. When did you go to Astoria?

A. About the same time.

Q. You came down with the expedition?

A. Yes, sir.

Q. Then you and Mr. Snell went over the books?

A. Went over the books, yes.

Q. Now, in 1913, Mr. Sanborn was very seriously ill?

A. Yes, sir.

Q. Practically that entire year?

A. Yes, sir.

Q. He gave it no attention whatever?

A. No, sir.

Q. Was he able to be around when you arrived?

A. Yes, he just was getting better so he could get out. I think I took a trip once with him when he just about was getting out, and could make a few hours' run with the automobile.

Q. Then you and Kendall and Gordon had a conference together?

A. Yes, sir.

Q. At the close of the 1913 season?

A. Yes, sir.

Q. Coming to the conclusion that the business was a failure?

A. Yes, sir.

Q. Sanborn personally—Sanborn & Son personally had advanced to the Kake Packing Company something like thirty-two or thirty-three thousand dollars of their own personal funds?

A. Yes, sir.

Q. Sanborn himself and Kendall had endorsed the commercial paper of the Kake Packing Company to the amount of something over \$20,000?

A. Yes, sir.

Q. They stood then personally liable to pay something like—something over \$50,000?

A. Yes, sir.

Q. How much more—how much above that fifty thousand do you think Messrs. Sanborn and Kendall had obligated themselves to pay personally, jointly?

A. Personally—about ten thousand, nine hundred, something.

Q. So that made Kendall and Sanborn obligated to pay for the Kake Packing Company something like sixty thousand odd dollars?

A. Yes, sir.

Q. Legally obligated to pay?

A. Yes, sir.

Q. You realized that?

A. Yes, sir.

Q. Then what solution did you offer for that situation? You were the man that had managed it.

A. Why, Mr. Kendall at first had been talking to me in regard to the condition and when we met—Mr. Sanborn and Mr. Kendall and I met on January 5th or 6th, at Astoria, we had started to talk over the condition and affairs of the Kake Packing Company.

Q. Could you tell us about what month that was?

A. Yes, sir, January 5th, 1914.

Q. That was the first time that Mr. Sanborn was able to get around to transact business?

A. Yes, sir.

Q. Now, go on and state what occurred then?

A. And in this meeting, as you have stated, it was quite a disappointment on the part of Mr. Sanborn, and also Mr. Kendall in regard to the profits made for the year, and I could realize that as well as they two, and I figured if there was anything I could do in the shape of getting some of these people interested that I had originally figured on getting interested with me; I would try to do so and it had to be put out in some kind of a

proposition, and that led me to send the first telegram, after getting an option for eighty-five thousand, on the entire holdings. That telegram I sent to my brother, and he wired back that he didn't think it was possible at that time to do anything, and I immediately wired to an attorney, which is a man that is of considerable means and a man that I had already met in Alaska, a couple of years ago on a trip, and who afterwards I made a very pleasant relation, friendly relation, and this man had been contemplating and anxious to get into the canning business, too, and also my cousin, Mr. Fred Morck, who operates in the oil business, back in Warren, Pennsylvania, and I sent him a telegram also, and they replied and said they would have to have something more definite in the shape — better write everything — write the proposition out in detail; they wanted full particulars. So I went to Mr. Sanborn again, and Mr. Kendall, and they drew up that option then.

Q. This option then, was drawn up at your request?

A. I don't know as my request; I couldn't say as to that, but we talked it over and that was the idea of Mr. Kendall, who put it in that form.

Q. I understood you to say that in putting the proposition to your friends and persons whom you thought would help you out, they wanted the thing in more definite shape, and therefore, you went to Kendall and Sanborn and told them this, and that resulted in this contract here of January 6, 1914, Plaintiff's Exhibit "59."

A. Yes, sir, I am familiar with that.

Q. So you entered into this contract. Now, the idea—this contract is a little bit hazy, but the idea of that

contract was and your understanding of it was, Sanborn and Kendall would take this \$65,000 that you were to pay them and apply that upon the debts of the corporation—the Kake Packing Company, were they not?

A. I don't know as I understand it just in that light. My understanding was that the \$65,000 was to simply deliver their stock to me, or to the people that I got.

Q. They were to put the \$65,000 in their pockets?

A. No, sir, it wouldn't be putting it in their pocket. It would be simply paying off the indebtedness, their own indebtedness; their own account there; it shows there on that statement.

Q. That is——

A. \$20,000 bills payable and ten thousand American Can Company and thirty-two thousand to Mr. Sanborn.

Q. That is right; they were to take this money, though?

A. Yes, sir.

Q. And pay it—apply it on certain claims due from the Packing Company?

A. Yes, sir.

Q. In other words, this \$65,000 that was to be received from Sanborn and Kendall was to be applied upon the indebtedness of the Kake Packing Company?

A. It certainly would be that fact.

Q. And then they agreed not only to do that, but they agreed they would pay something like ten thousand dollars spot cash in addition to that, didn't they?

A. Only if I surrendered my store account to them.

Q. In case you suffered an equal loss with them?

A. Yes, sir.

Q. Then their proposition was that: That if you bought from them, they would stand to lose the ten thousand—if you bought from them? That would be correct, wouldn't it? I don't want to — I am honest about this as I understand it. If you bought from Sanborn and Kendall, paid them the \$65,000, they would put ten thousand dollars on top of that, consequently they would lose ten thousand dollars if you bought from them?

A. The understanding was they were to pay these bills. Yes.

Q. And ten thousand more than \$65,000?

A. Yes, sir.

Q. They would lose then their \$17,000 they originally subscribed and the ten thousand on top of that. That is correct, is it?

A. It is correct, sir.

Q. And you, on the other hand, in case they bought from you, or in case you didn't buy, you were to lose your eighty-five hundred, because they were obligated to pay this \$65,000 anyway?

A. And my \$12,500 besides.

Q. Yes. If you didn't buy from them, they had to put up about seventy-five—\$65,000; they would have to put up \$65,000; in that event you were to waive your \$8500?

A. Yes, sir.

Q. That was a fair deal, wasn't it?

A. Yes, sir.

Q. You considered that a fair square deal, wasn't it?

A. It was just as square—absolutely it was all done in good faith, as far as I know.

Q. I understand, and I don't want you to think, Mr. Kirberger, in my questions here that I am insinuating anything against you. I want to treat you just as gentlemanly as I know how to treat anybody, and fairly too. But as I understand the contract, it was a mutual contract between you; that no matter how it came out, no matter whether you bought or whether you didn't, one of you was bound to lose \$10,000?

A. May I make a statement?

Q. Sure.

A. You understand, Mr. Fulton, that when the \$65,000 proposition was put up, this ten thousand nine hundred odd dollars there is in addition to Mr. Kendall and Mr. Sanborn's obligations to the company.

Q. Yes.

A. Now, this proposition, the way Mr. Sanborn put it up to me, and Mr. Kendall, that if I would make that assignment of the store account there, they would start in and pay these bills off, that was outstanding, outside the Kake Packing Company—the Kake Packing Company owing—to enable me to make this deal east, among my people, to prevent these other people, the creditors from jumping on the Kake Packing Company while I was absent.

Q. Now, here is a letter that Mr. Sanborn wrote you on March 21, 1914, which somewhat clarifies and explains the situation, does it not?

A. Yes, sir, I know the particulars of that letter.

Q. And at the same time, you wrote another letter explaining the same situation?

A. Yes, sir.

Q. And that gives a pretty clear idea of what your understanding was then?

A. Yes, sir, shows that I was trying to do.

Q. You were doing your best, I understand, to get out of a bad box. I don't recall that any of the stockholders got any money back, did they?

A. No, sir.

Thereupon, counsel for defendants handed witness a letter.

Q. That is your signature there?

A. Yes, sir.

Q. Now, who was Mr. Wallbridge?

A. He was the attorney I was telling you about; an attorney in Hooperstown.

Thereupon, counsel for defendants offered in evidence the documents just testified to, and the same were duly received and read in evidence, and marked Defendants' Exhibit "E," and are hereunto attached so marked, and made a part hereof.

Q. This is a statement showing the assets and liabilities of the Kake Packing Company.

A. That is correct to the best of my knowledge.

Q. It shows assets to be \$76,300.65; liabilities \$72,621.01. Included in that are the Astoria Iron Works, American Can Company, \$10,507.65; bills payable \$20,359.84, etc. Now, I notice here, Mr. Kirberger, that you state that this \$8500 transferred to Sanborn &

Kendall from my own and the Kake Trading & Packing Company account was made with the distinct understanding that this transfer is a legitimate transfer to them of this full amount." What do you say as to that transfer now?

A. I am not going back on that letter; I am not going back on that letter at this stage of the game, you can bet on that.

Q. I didn't think you would.

Q. When you wrote that letter you told the truth?

A. I am not going to deviate from the truth in any form, shape or manner.

Q. That isn't the question?

A. No, sir.

Q. When you wrote that letter, you told the truth?

A. Yes, I told the truth.

Q. The whole truth?

A. Yes, and nothing but the truth.

Q. Nothing but the truth, and that transfer of that \$8500 was an absolutely honest, square, flat-footed deal between two men, as men, wasn't it?

A. Yes, sir, there is no question in any form, shape or manner about the transfer, as far as any idea of fraud or anything like that.

Q. You were two business men; met on open ground. You knew what you were doing, and you made, as far as you thought at that time a good business deal, didn't you?

A. Yes, sir.

Q. Now, the \$5000 was not paid by you?

A. No, sir, it was not.

Q. But you got the extension of time, just the same, didn't you?

A. Got the extension.

Q. And you went back east, didn't you?

A. Before, yes; before that was given I came back. Extended after I returned from the east.

Q. You returned from the east in March?

A. May—no, March, that is right.

Q. So you had been east and had come back?

A. Yes, sir.

Q. And the result of your telegram was that the parties didn't desire to take it?

A. Well, they didn't—they haven't never come out like that. The parties kept hanging fire, and hanging fire, and hanging fire, and they were anxious to get in, but they couldn't get in contact with their own people that were in Florida or California, and it was a very hard winter there, and they just hung back, and hung back, although they were very anxious to come in, but on account of the financial condition, etc., they didn't come through as we anticipated at the time.

Q. You know that Mr. Sanborn and Mr. Kendall were practically the owners of the Sanborn Cutting Company, didn't you all the time.

A. Well, I didn't know it definitely, Mr. Fulton, that they controlled the Sanborn Cutting Company, but I knew that Mr. Kendall talked to me and said they contemplated making a deal with the Sanborn Cutting Company to take over, but I didn't know any more than that.

Q. Well, you understood that Mr. Sanborn was president and general manager of the Sanborn Cutting Company?

A. Yes, I knew that.

Q. And that Mr. Kendall was also interested in it?

A. Yes.

Q. They made no attempt to conceal that from you?

A. Absolutely none.

Q. And so when you were dealing with the Sanborn Cutting Company in making this sale of the assets of the Kake Packing Company to the Sanborn Cutting Company, you understood the full relation of Mr. Sanborn and Mr. Kendall not only to the Kake Packing Company, but to the Sanborn Cutting Company?

A. Yes, sir, I appreciated that.

Q. You understood that thoroughly and no attempt was made to deceive you in any way?

A. No, sir.

Q. You understood that. Do you think you could have made a better deal than you did with the Sanborn Cutting Company if you had been given further time?

Mr. ROBERTSON: We object as immaterial, if the Court please. It is immaterial, it seems to me, in this case, whether they could have made a better deal or not.

COURT: It goes to the question of whether or not in good faith; that may be a question of good faith; I don't know whether it is or not.

Mr. FULTON: I realize that the Sanborn Cutting Company occupy a very delicate position; your

honor appreciates that; they are bound to act in the utmost good faith.

COURT: He can answer.

Q. Do you think you could have made a better deal if you had had further time?

A. I might have, if I had had the whole summer to it, but I don't know whether then, on account of the war breaking out August 6th there, might have affected us again.

Q. Then, of course, it would have been necessary in any event for Kendall and Sanborn to have dug up about seventy thousand dollars in order to have given you that time, wouldn't it? In order that you should have enjoyed the whole summer in which to have secured a purchaser?

A. Well, I don't know that they would have had to expend that immediately. Of course, they were obligated to that extent there, as shown there on that statement.

Q. The creditors naturally wanted their money?

A. Yes, sir.

Q. I presume the creditors of the Kake Packing Company were no different from ordinary creditors; they wanted their money, didn't they?

A. Yes, sir.

Q. And in order to have given you the summer, it would have been necessary for Sanborn and Kendall to have carried this seventy thousand odd dollar indebtedness?

A. Yes, sir.

Q. You couldn't do it?

A. No, sir, I couldn't.

Q. So on May 11th, before the meeting of the directors of the Kake Packing Company, May 11, 1914, you and Mr. Sanborn had discussed the situation pretty fully, hadn't you?

A. Before May 11th.

Q. Yes.

A. Yes, sir.

Q. You came to the conclusion that something had to be done?

A. Yes, sir.

Q. You had done your best, your level best, to get somebody to buy that?

A. Yes, sir.

Q. Well, in either event, Sanborn and Kendall would have lost ten thousand dollars, or you?

A. Yes, sir.

Q. Each of you offered to sacrifice ten thousand dollars outside of the money you already had in, and you couldn't get a purchaser; that is right, isn't it?

A. I can put it this way, Mr. Fulton: That I was willing to make any kind of a sacrifice in order to save the company from going into bankruptcy.

Q. So were Sanborn and Kendall?

A. Yes, and that is the reason I made this sacrifice.

Q. You had a business reputation of your own to establish?

A. Yes, sir.

Q. So, when you met at the stockholders' meeting of May 11, 1914, you had practically made up your mind what you were going to do?

A. Yes, sir.

Q. What was your understanding about this 125 shares of stock that you signed over to Kendall and Sanborn? What was your idea about that? What was your understanding?

A. It was simply that when I went east, I was obliged to make that assignment there and turn over the stock to Mr. Sanborn and Mr. Kendall in order to get that deal—get that proposition to go east with.

Q. Oh, I see; you paid that for your option?

A. Well, I can't say that I went out and put it that way; no, I wouldn't say it that way, either.

Q. The Court here wants to know, and I want to know, too. We want to know what your idea is about it.

A. Yes.

Q. Now, you assigned Messrs. Sanborn and Kendall 125 shares of the capital stock of the Kake Packing Company?

A. Yes, sir.

Q. The assignment here says it is to be their property. Now, what was your idea about that; your contract is in; read it now. I may not understand it, but I would like to know what your views of this contract were.

A. Well, the truth of the matter was, Mr. Fulton, so long as it was well enough to have that instrument, all right enough, but I trusted in Mr. Sanborn, and I trusted Mr. Kendall.

Q. Yes, that was right, and they trusted you.

A. And I never even went to an attorney for advice on that option.

Q. No.

A. Never had any interview with anybody else, any other business man, only Mr. Sanborn, Mr. Kendall, and myself.

Q. Did they?

A. I don't know, Mr. Fulton.

Q. It was done in your presence there, wasn't it?

A. Yes, sir. No, they didn't have at that minute.

Q. Mr. Kendall you say wrote it?

A. Yes, I think he did; wrote it in lead pencil, first.

Q. Of course you have seen considerable of my writing; you know I didn't write that, don't you?

A. I know you didn't write it.

Q. You don't think I did?

A. No, sir, I don't think you did.

Q. It isn't my words there at all, or my language?

Q. I understand you say I didn't have anything to do with it as far as you know.

A. As far as I know, Mr. Fulton. You didn't have anything to do with that that I know of. Mr. Kendall wrote it out first, and I was anxious to make any kind of a sacrifice to keep the company from going under, and show that I wanted to do what I thought was right in their eyes.

Q. That is right, but I wondered what you meant when you said that you didn't have the advice of an attorney.

A. I didn't have the advice of an attorney whether that proposition—the option is legal or whether it wasn't legal. I didn't know that.

Q. That is what you meant?

A. Yes, sir.

Q. I didn't understand; I thought that is what it was. It says here: "Should said Ernest Kirberger and A. C. Kirberger fail to perform and carry out the terms of this agreement as herein specified on or before February 15th, 1914, then all their right, title and interest in and to the stock of the Kake Packing Company, now standing in their names upon the books of the company shall cease, and same shall revert to and become the personal property of the said F. P. Kendall and George W. Sanborn." Now, isn't this the fact, Mr. Kirberger: That if you failed to make this business deal the entire burden of paying the indebtedness of the Kake Packing Company would fall upon the shoulders of Mr. Sanborn and Mr. Kendall. That is a fact, isn't it?

A. Yes, sir.

Q. And your object was and their object was that if they did pay it they wanted to own the stock?

A. Yes, sir.

Q. That was the idea. That is all right. Now, when the transfer of the assets of the Kake Packing Company was made to the Sanborn Cutting Company, was there any statement made to the Sanborn Cutting Company, or document, showing the amount of the liabilities, as well as the assets of the company?

A. I think that is the same statement there, Mr. Fulton, that was presented at the meeting, yes, sir.

Q. That was handed to the Sanborn Cutting Company?

A. Yes, sir.

Q. And is made a part of the record here?

A. Yes, sir, that is the same one.

Q. That is the same document?

A. Yes, sir.

Q. This page 30 of Defendants' Exhibit "D," that shows the assets to have been \$76,300.65, and its liabilities \$72,621.01.

A. Yes, sir.

Q. That was the amount of money that the Sanborn Cutting Company was to pay for the assets?

A. Assets, yes, sir.

Q. They were to pay this according to the provisions—that was their agreement?

A. Yes, sir.

Q. If they did pay it, then they have complied with their agreement?

A. As far as I know.

Q. You have never heard of any claim to the—

A. Never heard of anything to the contrary.

Q. Being presented?

A. No, sir.

Q. And the understanding at that time was that the claim of the Kake Trading & Packing Company should not be paid by the Sanborn Cutting Company, wasn't it?

A. It never entered in on anything — never was brought up again, Mr. Fulton. Never since January 6th, never was mentioned again in regard to any matters at all.

Q. But it was not included?

A. No, sir, was not included in that.

Q. And was purposely omitted, was it not, from that statement?

A. Couldn't help but be omitted after it was signed over.

Q. I say was purposely omitted?

A. Yes, sir.

Q. And your understanding was clear and flat-footed that the Sanborn Cutting Company was not to pay the Kake Trading & Packing Company any part of that \$8500, or anything it had against them?

A. I never figured on anything that the Sanborn Cutting Company was to pay them; it never occurred to me at all.

Q. Don't you know that was absolutely and thoroughly understood, that the Sanborn Cutting Company was not to pay any sum of money whatever to the Kake Trading Company?

A. It never was—it was never considered to pay anything that I know of.

Q. I say, wasn't it understood that it was not? Wasn't that your understanding?

A. It must have been my understanding according to the papers there; I can't go back on that.

Q. I know, but wasn't it your understanding, Mr. Kirberger?

A. Absolutely was my understanding as far as I know, that I couldn't come back after the account was assigned; I couldn't very well expect the Sanborn Cutting Company to come back here and pay something that I had agreed to sign over.

Q. I know, but suppose the assignment—I don't care about the technical propositions involved here, but am just talking about the proposition, just man to man.

The understanding was flat footed and square toed that the Sanborn Cutting Company was not to pay the Kake Trading Company any part of this claim against the Kake Packing Company?

A. No, sir, was nothing said about that.

Q. I know, but wasn't it your understanding, Mr. Kirberger, it was not to do so?

A. The understanding was, as far as I know, Mr. Fulton,

Q. You were the only man that would know, outside of the Sanborn Cutting Company, weren't you?

A. Yes, sir.

Q. Then what do you say about it, frankly, man to man?

A. Why, I say just the same as I said there in the assignment; I assigned it over—or in the book there.

Q. You never expected to get it back?

A. I couldn't see how I could expect to get it back.

Q. I say did you ever?

A. I never did.

Q. Never entered your head it was going to come back?

A. I don't know whether there would be any consideration of the thing or not. In fact, I never figured anything else about it. After the thing was all over, I went up there and started to do the best I could.

Q. And when these conveyances were executed, conveying the assets of the Kake Packing Company to the Sanborn Cutting Company, you understood that the claim of the Kake Trading Company against the Kake Packing Company was not to be paid by the Sanborn Cutting Company?

A. Yes, I understood that.

Q. You understood that?

A. Yes, sir.

Q. That is what I thought, and so did Messrs. Sanborn and Kendall understand it, and so did the Sanborn Cutting Company through them—as you understand it; is that right?

A. Yes, sir.

Q. Now, there is a charge made here, Mr. Kirberger, in this complaint, that Kendall and Sanborn bulldozed you; that they made you sign a lot of documents down there against your will and against your consent. Is there any truth in that at all?

MR. ROBERTSON: If the Court please, we think to call on Mr. Kirberger to answer the question in the direct form that way—it must be realized that while it is true Mr. Kirberger is here on our behalf, in a way that places the plaintiff to this suit to a disadvantage, because I have been compelled to bring Mr. Kirberger here; what Mr. Kirberger did at that time, as a matter of fact, is adverse to the plaintiff's interest at this time.

MR. FULTON: If counsel for plaintiff objects to the witness answering this question, I want it understood I will not have him answer it; if they object to having it in.

MR. CROSSLEY: The trustee in this case has brought the witness here.

MR. FULTON: Well, the trustee.

Q. Let's see; you continued the business of the Trading Company up to and until a petition was filed—

until you presented a petition on behalf of such company to have it adjudged a bankrupt?

A. Yes.

Q. You carried your business on the same as you did before?

A. Yes, sir.

Q. Are you still carrying it on?

A. Now?

Q. Yes.

A. Yes, sir.

Q. Buying new goods right along?

A. Yes, sir.

Q. Buying and selling your goods the same.

MR. ROBERTSON: Do you mean——

MR. FULTON: I don't make any question about that. I don't care what they are doing with this stuff. I just want to know what he is doing up there. I have no question in the case. I don't question but what it is perfectly straight. I just wanted to know whether he was.

A. Yes, sir.

REDIRECT EXAMINATION:

Interrogated by Mr. Robertson:

Q. Mr. Kirberger, you don't mean you personally carry on this business, do you?

A. No, sir.

Q. You mean Mr. Paine is carrying it on?

A. Yes, I didn't understand Mr. Fulton meant I was.

MR. FULTON: No, no, just mean the receiver or trustee was carrying it on.

A. Yes, sir.

MR. FULTON: Just simply wanted to know what you were doing.

A. Yes, sir.

The letter to John Wallbridge (referring to Defendants' Exhibit E) and also the letter that Sanborn wrote me on March 21, 1914, were written after I had been east, and were written two months and fifteen days after I had assigned my stock to Kendall and Sanborn, and after I had sought advice from Mr. Wallbridge, and he had given me his opinion of that assignment, and then I came back and put it up to Mr. Sanborn, and then they wrote this letter.

Q. Do you mean to say, Mr. Kirberger, that when you made this assignment, or contract, whatever they want to call it, on January 6, 1914, that they gave you any communication or any other kind of a contract whatsoever, showing that they were going to assume all liabilities? Isn't that Plaintiff's Exhibit No. 59 the full contract that was made on that date?

A. Yes, sir, that is the paper I had when I went back east. Sanborn wrote the last letter on the Sanborn - Cutting Co.'s letter head. The fact of the matter is, that while I was back there, it would require time, extra time, and furthermore that the option was too stiff for them. They claimed they would have to have all the stock and all the liabilities paid back there, before they would want to give it any great consideration.

So, I came back to Astoria. I wrote letters back there, and I wrote letters to the west, out here to Mr. Sanborn and Mr. Kendall, or Mr. Sanborn in particular, and there was nothing could be done until I returned or interviewed these gentlemen as to the results of my interviews with the eastern people.

Q. Do you wish to change your statement, Mr. Kirberger, that that is a false statement, an untrue statement in this assignment, where it says that Kendall and Sanborn had made certain cash advances to yourself and your brother, A. C. Kirberger? Is that true?

A. Well, I think that they didn't make these advances to me personally; they made them to the Kake Packing Company.

Q. Now, I understood you to say that the 125 shares of stock were never re-assigned to you?

A. No, sir.

Q. Now, Mr. Kirberger, Mr. Fulton laid some little stress on the fact that you didn't tell the truth in regard to this telegram where you wired to Mr. Kendall and said that you contemplated the purchase of machinery. Now, I would just like to have you straighten that matter out, as to whether that telegram was sent in good faith or not in good faith.

A. The proposition is simply this in regard to that telegram: when I arrived down there, I arrived with the intention of looking up machinery, and get posted on the kind of canning machinery, and it was suggested by some cannery men that I go over and interview Mr. Kendall on the new sanitary system, and the only thing to do was to wire Mr. ——. I had already written

several letters to these same people we are talking about now in Seattle, and as my own people expressed and have expressed, my brother and sister expressed a desire to go into the matter, take stock in an enterprise of my own for some years previous to that, and I had that hope with them all the time during 1910 and 1911, but hadn't had it formulated in such shape so we could come to a definite deal yet, and meantime it was my intention to get all the information on this new system, and for that reason I wired Mr. Kendall and he told me to come over there. As far as contemplating purchase went, outright, I was unable to do so at that time, and I know Mr. Kendall knows that to be a fact.

Q. Now, Mr. Kirberger, do you mean to give the Court the impression that entirely upon your solicitation Mr. Kendall and Mr. Sanborn took an interest in the Kake Packing Company?

A. Absolutely not; he didn't on my solicitation whatever. I went over there and was talking about buying canning machinery, and showed him my deal; showed him my proposition in good faith, and showed him later the features and everything else about the proposition; showed my experience up there; how long I had been there; talked over my proposition in general. Never took the proposition up, right in regard to it except he was talking about himself; he talked about going into the deal with me, on account maybe I could use his son up there; he would be glad to take a little stock on that account in this proposition—in this organization, and it was just that time everybody was very enthusiastic about the canning business, for the year 1911 was a very

big year in the salmon canning business, and everybody interested in the game know that—that the people in the game made good profits in 1911, and I had never yet been able to work this proposition up to such a point where I wanted to get my people into it, when it was profitable. And I had had this up before with these people, but the conditions never looked right; just about the time I got it consummated the market went bad and I discontinued and abandoned the idea again, but this time, 1911, was a big year; everybody knew that. I talked with Mr. Kendall along that line; he talked the same way with me, and that is the reason he went in.

Q. Did you know Sanborn before that?

A. No, sir, I didn't know him.

Q. Who took you to Sanborn?

A. Mr. Kendall.

Q. Now you say—you told Mr. Fulton that you were the superintendent and general manager in the fall of 1912 and '13. Do you mean by that you had the absolute operation and outlined the policy of the cannery during those years?

A. I can't say that I—I had charge up there in 1912. I had charge of the operations there in 1912, and then we had a foreman of the cannery that had charge of the canning line and machinery line and all that, and I was always to operate under direct instructions of Mr. Kendall and Mr. Sanborn, because I knew they were experienced men, and I was always willing to take any suggestion and operate according to their direction or instruction.

Q. And 1913?

A. 1913 same proposition.

Q. And in addition they sent up Mr. Range?

A. In addition they sent up a man that had charge of the canning operations—inside exclusively.

Q. Now, where was the home office of the Kake Packing Company?

A. Astoria.

Q. All the time?

A. All the time.

Q. The books were taken to Kake simply during the fishing season and brought back to Astoria and kept there during——

A. The closing up of the books.

Q. Now, did you mean to tell Mr. Fulton that Sanborn didn't get well of the typhoid fever attack that he had in the summer of 1913 until January 5, 1914? That that was the first time you saw him around the office?

A. No, sir, that is not correct.

Q. What did you mean to say?

A. When I arrived there, along about the 15th of October, in Astoria, Mr. Sanborn was just convalescing then; he was just getting out, and I made a trip with him in the automobile to the station; the first time I had a chance to meet him and that was probably—I don't know the actual date, in the neighborhood of a week or ten days after my arrival there; perhaps only three or four days. I can't recall that definitely.

Q. Did he have any further sickness from that time?

A. Not to my knowledge.

Q. Then you saw him a great many times?

A. I saw him every day.

Q. Did he assist in making up this statement of assets and liabilities?

A. Yes, sir.

Q. Which you used to take back east?

A. Yes, sir.

Q. Now, you say that Kendall and Sanborn together had obligated themselves to pay something like \$60,000, Mr. Kirberger. Wasn't \$32,000 of that a direct debt to Sanborn and his son? Is that correct? For things they had furnished the Kake Packing Company?

A. I don't know just exactly how you would put that, but my understanding of that account was Mr. Sanborn was acting practically as our bank, and whenever we had any charges against George W. Sanborn & Son, we would charge it up to them, and when we got any money from them, or anything, we got it from them, according to my recollection.

Q. Do you mean—did that include any commission that they got on the sale of fish?

A. I presume that the account sales rendered for all sales went to Mr. Sanborn, and the money that the Kake Packing Company got from George W. Sanborn Company account thereof, came from them as far as I know.

Q. Look at this Plaintiff's Exhibit "63"; when you speak of their having pledged their credit for some \$60,000, isn't it a fact that, as far as you are now advised, that the item which is called bills payable, twenty thousand and some odd dollars, is what they pledged their credit for?

A. Why, my understanding that part of that twenty thousand there was extra funds that we borrowed in perhaps a Portland bank for financing and carrying on the mild-cured salmon business; if I remember rightly; something of that kind.

Q. The American Can Company item of \$10,-504.15——

A. Is strictly an account for cans and cases purchased from the American Can Company.

Q. And the company of which Mr. Kendall is the representative on this coast at this time, wherever that is?

A. Yes, sir.

Q. And the item of F. P. Kendall, \$4004.35. That was a direct loan by Mr. Kendall?

A. I am very positive that is a direct loan from Mr. Kendall to the Kake Packing Company.

Q. George W. Sanborn & Son, \$32,452.04. Do I understand you to say that you don't know whether or not that means pledged money or whether it means money out of which Mr. Sanborn and his son were making a profit in the sense of buying goods they furnish the Kake Packing Company?

A. I understand that amount; I am familiar with that.

Q. Does that include their selling commission, do you think, or did you understand it?

MR. FULTON: They didn't get any commission until they sold.

A. I imagine that it is included in there. I don't know very much more about it than that.

Q. Now, did you go to either Mr. Kendall or Mr. Sanborn and request them to draw up this option which you say was drawn up there on that date—Plaintiff's Exhibit 59?

MR. FULTON: What are the facts about it. I don't think that is fair.

COURT: What option is that? The one of January 6th?

MR. FULTON: Yes. Did he go to them? What are the facts, I think the question should be—what are the facts? We have gone into that two or three times, however.

COURT: I think it has been covered.

MR. ROBERTSON: As a matter of fact, I felt that perhaps Mr. Fulton's cross examination had left in your honor's mind the impression that Mr. Kirberger had directed or requested that option be drawn up in that form.

MR. FULTON: Suppose he had; no crime about that.

COURT: The impression on my mind is that it was drawn up for the benefit of Mr. Kirberger to give him an opportunity to take over this plant if he could raise the money.

MR. ROBERTSON: That is the very point I desire to find out about.

Q. Now, Mr. Kirberger, on January 5, 1914, the night before or the day before, I understood you to tell the Court Mr. Kendall had made a suggestion to you to take all the plant over for \$85,000, and you wired back east that you had an option for \$85,000. Is that correct?

A. Well, I didn't have any written option; we were just talking that matter over and it was suggested doing that.

Q. You did wire back east that you had such an option?

A. Yes, sir.

Q. Then when you got—when you couldn't do anything with that option did you have further conversation with them?

A. Yes, sir.

Q. Now, was the purpose of this option particularly for your benefit or for the benefit of the Kake Packing Company that you all three got there together and tried to serve—to aid the Kake Packing Company?

A. That was my understanding of it, yes, sir.

Q. And if you paid the \$85,000 under this option, Mr. Kirberger, Kendall and Sanborn would be enabled to pay off the \$62,000, \$20,000 of which they had their name on, in some way, the \$4000 to Kendall himself, the \$10,000 to Mr. Kendall's employer, the American Can Company, and the \$32,000 to Sanborn & Son. Isn't that true?

A. Yes, sir.

Q. And by the \$65,000 they were going to be enabled to liquidate their entire debts against the Kake Packing Company, were they not?

A. Yes, sir.

Q. And did your account of \$8500 go in? Was it to be included? State about that. You were not going to have your indebtedness liquidated under that arrangement, were you?

A. No, sir.

Q. Or the Kake Trading & Packing Company. No, I thought you were not. Now, Mr. Fulton said it was a man to man business, kind of a sporting chance; you threw away \$10,000 or these two gentlemen threw away \$10,000. Now, in either event, Mr. Kirberger, whether you paid your option, or \$65,000, or didn't pay it, in either event the store account was gone, wasn't it—the \$8500?

A. Yes, sir.

MR. FULTON: I object to that, because the option shows absolutely to the contrary; shows that if this man bought it out, unless he was dishonest, he would pay his own bills.

MR. ROBERTSON: Not the store account, may it please the Court.

MR. FULTON: Oh, these papers speak for themselves; I don't care.

COURT: Let him answer.

Q. You said yes to that, didn't you?

A. Yes, sir.

Q. Isn't it also true, Mr. Kirberger, that in either event Sanborn and Kendall were going to either have

the entire plant in their names, or else they were going to get all their own indebtedness save \$10,000?

A. Yes, sir.

Q. The Kake Trading & Packing Company—you took upon yourself, Mr. Kirberger, by means of these two assignments, a risk of \$12,500 worth of stock in the Kake Packing Company and a store account of \$8582 plus the six thousand dollars your brother had paid. Isn't that correct?

A. Yes, sir.

Q. Amounting to some \$27,000. Now, you said to Mr. Fulton that during the interval you had been back east, Kendall and Sanborn had paid up some of the liabilities?

A. Yes, sir.

Q. Do you know where they got the money to pay off these liabilities—the major portion of it?

A. I don't know specifically the amount that they got. I have an idea where some of it came from.

Q. Where did it come from?

A. Why, I presume there were some sales of salmon, both the pickle and the canned salmon, and there was some sold there that was—some marine insurance collected from the launch; I know they got that.

Q. Wreck of the launch "Kake"?

A. Yes, sir. But as far as anything else was concerned, I couldn't state that, Mr. Robertson.

Q. What was the insurance from the launch "Kake," \$6000, less commission?

A. Yes, sir.

Q. Now, Mr. Kirberger, the creditors—Mr. Fulton

endeavored to show that the creditors were pressing for money—the heavy creditors were pressing the Kake Packing Company for money. Isn't it true that the defendants themselves were the heavy creditors that were pressing the Kake Packing Company for money?

A. They certainly were anxious to get the money for them. That is true.

Q. Were you making any pressing or trying to press your claim of \$8582?

A. No, sir.

COURT: How much of the amount Sanborn and Kendall listed in their claim was for paper they had endorsed—paper of the Packing Company that they had endorsed?

A. I am quite sure that—the bills payable I am sure they had endorsed, and I don't just remember how Mr. Sanborn's account there was exactly handled.

MR. FULTON: \$20,000.

COURT: That will come later, I suppose.

Q. Now, the claim of the Kake Trading & Packing Company wasn't brought up on May 11, 1914, by you, was it?

A. No, sir.

Q. But you had assigned it to Kendall and Sanborn, the owners of the Sanborn Cutting Company, way back on January 6th, prior to that date, hadn't you?

A. Yes, sir.

RECROSS EXAMINATION:

Interrogated by Mr. Fulton:

Q. Now, don't you know, Mr. Kirberger, that as a matter of fact that of the thirty-two thousand some odd dollars of the claims that Sanborn listed there—Sanborn & Son—\$20,000 was for the note that they had endorsed at the Astoria Savings Bank?

A. Well, it has been so long that I just kind of lost the trend of that thing there, but I know they certainly endorsed those papers there.

Q. And the bills receivable in this statement shows \$20,000; that was all endorsed by Sanborn and Kendall?

A. Bills payable you mean?

Q. Yes.

A. Yes, sir.

Q. That was all endorsed by Sanborn and Kendall?

A. Yes.

Q. Now, I am asking about the Savings Bank. Isn't that \$20,000 of Sanborn & Son's claim—wasn't that for paper they had endorsed?

A. I am pretty sure; I feel positive. I know they had business relations with the Astoria Savings Bank, and I know if there was any paper there, Mr. Sanborn was on the paper.

Q. About \$20,000. That would make \$40,000 that Kendall and Sanborn were on bank notes for. And don't you also know that Messrs. Sanborn and Kendall guaranteed the American Can Company payment of its bills?

A. Yes, sir.

Q. So, there is \$50,000 that they were security for right off, without going any further. Now, speaking of these 125 shares of stock, did you ever ask Sanborn or Kendall to transfer it back to you? Did you ever ask them for it?

A. No, sir, I don't think I asked them for it, only when I went east I think I made the remark if I made the deal—that I had different ways back there that I probably wanted to get this money—that I might find it necessary to have that stock to show it as collateral or something to assist me in my deal back there?

Q. And he told you you could have it?

A. He said I could have it at that time.

Q. He said you could have it?

A. Yes, sir.

Q. Now, this statement of assets and liabilities you spoke of so frequently, was made from the books of the Kake Packing Company alone, wasn't it?

A. Yes, sir.

Q. And there were in many cases errors, one for instance, the First National Bank—account of the bills payable to the First National Bank of Portland; as a matter of fact there was some three thousand dollars more than as shown on the books of the Kake Packing Company, is that true?

A. I never knew that, Mr. Fulton; never had been informed of that.

MR. FULTON: Well, we can show that later, your honor.

Q. How frequently was Mr. Kendall at Kake?

A. He was there in May, 1912.

Q. Kendall? How long was he there?

A. Why, I don't know definitely; maybe a week or ten days or perhaps it was longer. I can't remember just exactly without looking it up.

Q. Of course; a week or ten days; when was he there the next time, if you recall?

A. I don't think he was there in 1913. He was there last year for a short time; I wasn't there then, of course.

Q. I mean prior to the time of the sale to the Sanborn Cutting Company. Only once, wasn't he?

A. He was there in May. I can't remember, Mr. Fulton, whether he was there again or not. Sometimes I think he was, but I can't connect up the instance. I think only once, in May.

Q. Mr. Kendall says only that time.

A. Yes, that is what I thought.

Q. He wasn't there in 1913?

A. No, he anticipated going but couldn't get away.

Q. That is when he wanted you to tie up those deer for him?

A. Yes, sir.

Q. Mr. Sanborn, how frequently was he there while the cannery was being run by you?

A. Along about August 15th to 18, 1912.

Q. Was nobody visited you at all in 1913?

A. No, sir.

Thereupon, counsel for plaintiff offered and there was read in evidence the deposition of E. R. Jaegar, a witness on behalf of plaintiff, the testimony of said witness being substantially as follows:

E. R. JAEGER.

Interrogated by Mr. Gunnison:

Q. State your name.

A. E. R. Jaeger.

Q. Where do you reside?

A. At Juneau.

Q. What is your occupation?

A. Laundryman.

Q. How long have you been in Juneau?

A. About twenty years.

Q. Are you familiar with real estate conditions generally in Southeastern Alaska?

A. I think so, as much so as the average man.

Q. You own real estate in and about Juneau?

A. Yes, sir.

Q. Do you know the property belonging to the Kake Trading & Packing Company at Kake and Point Berry, Alaska?

A. Yes, sir.

Q. You have been there?

A. Yes, sir.

Q. Are you the same E. R. Jaeger that was appointed appraiser in the bankruptcy proceeding in which the Kake Trading & Packing Company was bankrupt?

A. Yes, sir.

Q. As such appraiser, did you appraise the real estate belonging to that company at Kake and Point Berry?

A. Yes, sir, we appraised it.

Q. In the appraisal you fixed the value of buildings, a store located at Kake at \$3500.

Objected to as leading. Objects to any valuation given in the bankruptcy matter as being irrelevant, immaterial and incompetent.

Q. You remember the value you placed on these various properties which you testified to as having appraised?

Objected to as irrelevant and immaterial.

A. I have a recollection of values, yes, sir.

Q. Could you refresh your recollection from an examination of a copy of the appraisal?

A. Yes, sir, (Looks at document.)

Q. After refreshing your recollection in the matter, what do you say is the valuation of the buildings and store location situated at—what was the value at the time you appraised it? (Question withdrawn upon objection.)

Q. What was the appraisal value placed on the property?

Objected to as incompetent and irrelevant for the purposes of this suit.

A. We valued the store and outbuildings at \$3500.

Q. You also appraised the beach house?

A. Yes, sir.

Q. What was the appraisal there?

Objected to as irrelevant, immaterial and incompetent for the purposes of this suit.

A. \$150.00

Q. You also appraised the restaurant at the cannery?

Same objection as last.

A. Yes, sir, at \$115.00.

Q. Did you appraise the Point Berry site?

A. We went there for the purpose of placing a value upon it.

Q. What value did you place upon it?

Objected to as irrelevant, immaterial and incompetent for the purposes of this suit.

A. After going there, and after seeing it and gathering all the facts in relation to the same, we could not see that it was of any value. We placed no value upon it.

Q. When was it you took that appraisal?

Same objection as the last.

A. In May last—May, 1915.

Q. Have you been generally familiar with business conditions and business values of property in South-eastern Alaska between, say, the first day of July, 1913, and the time of that appraisal?

A. Yes, sir, in a general way.

Q. What do you say as to whether or not the value—or whether there had been any change in value in this property between the month of January, 1914, and the time of the appraisal?

A. I know of nothing that would make any change whatever.

Q. What in your opinion is the fact as to whether there was any change between those dates?

Objected to as incompetent.

A. I don't know of anything that could have tended to have made that change.

Q. Do you think there was any change?

A. I don't think so.

CROSS EXAMINATION:

By L. P. Shackelford, Esq.:

Q. Mr. Jaeger, your principal business for the last fifteen odd years is in connection with running a laundry and hotel?

A. Yes, sir.

Q. Ever engaged in the cannery business?

A. No, sir.

Q. This property referred to by Judge Gunnison, concerning which you made returns in your appraisal—this is a cannery property?

A. Not exactly; it had been used as a saltery site.

Q. It is a fishing site, then?

A. Yes, sir.

By JUDGE GUNNISON:

Q. Which do you refer to—Point Berry?

A. Yes, sir, Point Berry.

By MR. SHACKLEFORD:

Q. What about the Kake property?

A. It is a store site and trading point—no wharf.

Q. What other structure is there?

A. There was no other except the Beach House and an outhouse and warehouse.

Q. What is the Beach House used for?

A. Just a house they got hold of.

Q. Small restaurant there?

A. Yes, sir.

Q. What size was it?

A. I don't know exactly; we just appraised the contents, the dishes, range, etc.

Q. How far is Kake from the nearest fair - sized town?

A. The nearest place is Petersburg; approximately 60 miles distant.

Q. Kake is located on Rocky Pass, is it not?

A. Kake is located on——

Q. It is not on the main traveled line of steamers?

A. No, it is off that.

Q. What boat service is there?

Objected to as irrelevant and incompetent and not proper cross examination.

A. The mail boat between here and Kake, I believe, for about nine months makes a trip every week; but in winter time they have a mail boat there every two weeks.

Q. What is the population there at Kake?

Same objection as last one.

A. I am told that there is between two and three hundred natives there when they are at home.

Q. They migrate during the summer fishing.

A. Yes.

Q. I understand you put no value on the Point Berry location?

A. No, we put no value on it.

Q. What was the total valuation on the real and personal property outside of the store?

A. \$3765.00.

Q. Is this the only visit you have made to this trading station?

A. Yes, sir.

Q. How many natives were there there when you visited the place, would you say?

A. I don't believe there were many home then—perhaps a hundred of them around there.

Q. What size is this store?

A. I don't know exactly; I should say about 30' by 60'.

Q. Rough building?

A. Yes, a fairly good building.

Q. It was so distant from other points that wreckage valuation of the building would not amount to anything?

A. No, sir.

Q. The value of the building depended principally on its income-bearing possibilities as a trading post?

A. Yes, sir, principally so.

Q. Was the store in operation when you were there?

A. Yes, sir.

Thereupon, plaintiff rested.

In order to sustain the issues on behalf of the defendants, the defendants called as a witness on their behalf

GEORGE W. SANBORN

who being first duly sworn on oath testified as follows:

I am one of the defendants in this case; I live at Astoria, Oregon, and have lived there since 1883, and I am, and have been, since 1886 or 1887, engaged in the cannery and commission business. I have been connected with canneries since 1900, and since 1900 I have been direct owner of two corporations. The first cannery I was connected with was at Tillamook. It was incorporated in 1886 or 1887. The next one was a private firm of Kendall & Sanborn; that was in 1900 and 1901. I think in the fall of 1901 or early in 1902, the Sanborn Cutting Co. was organized. We built a cannery at Astoria, Oregon, and the building and machinery, I should say, cost about \$35,000.00, when first built. We have built largely on it since. We have now a cold-storage plant, cannery and seining grounds, operate seines, launches, and boats. I am also connected with the Sanborn-Cram Company in Burnett Inlet in Alaska. I was instrumental in building it, and the cannery is the same size as the Kake plant. It is about one hundred and twenty-five or thirty miles, maybe 150 miles, from Kake. The first year, it was operated by a man by the name of Hall, and since then by Mr. Armstrong, president of the company.

I remember the instance of the meeting of the stockholders and also the board of directors of the Kake Packing Co., held on May 11, 1914.

In January, we entered into a contract, giving Kirberger an option on the Kake plant. Previous to that, we had talked over the Kake proposition. It hadn't proved satisfactory to anybody and as far as I was concerned, I absolutely refused to go on with it the same as it had been run, that is under the same management, and it was a question of either his buying us out—the plant was busted, practically bankrupt—pretty near it—and it was a question of his buying Mr. Kendall and I out or we buying him out, and we talked the matter over and came to the agreement of January 6th, I think is the date—the one that is here, Plaintiff's Exhibit "59."

Q. It is alleged in this complaint, and also testified to by Mr. Kirberger, that he hadn't received the advice of an attorney in the preparation of that, or prior to its execution. Did you have the advice of an attorney?

A. I did not. I had not talked with an attorney about it at all.

I think Mr. Kendall wrote out something on paper and then I wrote something, and Kirberger wrote something; and we kind of put the three propositions together. That is my remembrance of it.

Mr. Kirberger failed in making the deal with his people in the east. He asked for, I think, two extensions and I think we gave him two extensions, one while he was east, if I remember right, in February. Then on his return we revised the proposition. Defendants' Exhibit "E" is the revised proposition. This was done at Kirberger's request, to give more positive information

as to standing. That is how Defendants' Exhibit "E" came to be executed.

In regard to the assignment of \$8582.21 by the Kake Trading & Packing Company to us, we gave Kirberger an option and said that we would pay off—providing he would cancel this debt, we would pay off the indebtedness of the Kake Packing Company; that is, somebody had to pay it off; we either had to pay it off or throw it into bankruptcy, and Mr. Kendall and I personally were responsible for practically all of the bills of the Kake Packing Company, that is, what money had been borrowed we were endorsers and what bills—with the exception of a few bills, possibly, in Seattle or Juneau, we were morally responsible for. I don't know that we would have been legally.

Attached to Defendants' Exhibit "E" is a list of the liabilities, that is, of the supposed liabilities of the Kake Packing Company.

Mr. Kendall and I had guaranteed the indebtedness due the American Can Company, also the Astoria Iron Works. The amount of the American Can Company's bill was \$10,507, but afterwards proved to be more. I wont say there were errors; there were additional charges for interest we had to pay when these accounts were paid.

Thereupon, counsel for defendants handed witness a writing and asked said witness what that statement was.

This is a statement of the actual payments for the Kake Packing Company, that is, the actual payments

that the Sanborn Cutting Company paid, Sanborn Cutting Company and George W. Sanborn, and between the two of us, between our two offices and charged to Sanborn Cutting Company, so all paid by the Sanborn Cutting Company, for the actual liabilities of the Kake Packing Company. The bills payable are shown on the original liability statement, the one Mr. Kirberger made up, \$20,359.84; the actual bills payable account.

This book that I have in my hand is the Kake Packing Company's ledger. It was kept by Mr. Kirberger and Mr. Snell. Mr. Snell was the bookkeeper who went to Alaska.

Thereupon, counsel for defendants offered said book in evidence, and the same was received and read in evidence, and marked Defendants' Exhibit "F," and is hereunto attached so marked, and made a part hereof.

I have made a few entries in there myself, winding up the Kake Packing Company business. There was an item of \$3481.70 we found in going over the books.

Q. What is this?

A. This is the bills payable account.

Q. Page 3. This is the book of the Kake Packing Company from which——

A. From which that statement was taken. The balance originally shown on the ledger was \$20,359.84, the same amount as they show on their liability statement, but in addition to that was an item of \$3481.70 due the First National Bank of Portland which was credited to Canned Salmon Account in error. The books

show that. It made an error in the bills payable account of \$3481.70. The error was made on May 1, 1913, on page 3, in Defendants' Exhibit "C," so that the actual bills payable at that time should have been on the Kake Packing Company books \$23,841.54, instead of \$20,-354.84. These items consisted of an account of \$15,000 due the First National Bank of Portland in three notes, endorsed, I believe, by Mr. Kendall and myself. I would not be sure. We have the notes here. We were responsible for them; we guaranteed them, anyway. We were the ones that got the money. Yes, I signed the note, they were not endorsed. I signed as principal. Both Mr. Kendall and myself signed as principal. These notes were made whilst I was laid up, and they were signed by my son; he had full authority to do so. The amount of these three notes is \$5000.00 each. The rest of the \$20,000.00 was in four notes of \$1250.00 each to S. S. Gordon. I don't think these notes were guaranteed. I wouldn't be sure of that. That is money loaned by Mr. Gordon to the Kake Packing Company which we agreed to take up; I don't know whether I endorsed those or not. No, that is plain Kake Packing Company; they are signed by Kirberger, as president, and Sanborn, as secretary. The four notes given to S. S. Gordon—Kake Packing Company notes, no endorsement. The next item is American Can Company note of \$3841.54. This we guaranteed; we guaranteed the American Can Company account. That makes the \$23,841.54.

Now, in addition to that, is the George W. Sanborn account shown on these books, or this statement, which I have, for \$31,010.88, \$20,000.00 of that was money

borrowed from the Astoria Savings Bank, voucher 5275. These were endorsed by us, Mr. Kendall and myself.

Q. Now, in fact, about how much money were you legally, as you understood it, obligated to pay?

To this question, counsel for plaintiff objected upon the ground that it was not the best evidence.

Thereupon, counsel for defendants made the following statement:

If this is not important to your honor, I wont take up the time doing so. I can cut this all out and get right down and show the payments that we have made, if you prefer it.

THE COURT: I think you better. I don't see how this is important; the question is what they agreed to pay and what they did pay, as far as your case is concerned. Of course, if counsel wants further information, he can require it.

MR. FULTON: That is my idea about it, but sometimes my idea doesn't always agree with that of the courts.

Q. I call your attention to the minute book of the Kake Packing Company, and particularly pages 32 and 33, where a resolution was adopted by the stockholders directing a sale of the assets of the Kake Packing Company to the Sanborn Cutting Company, and also a resolution was adopted by the directors, directing a sale of the assets of that company to the Sanborn Cutting Company, and referring to certain accounts that

were to be paid. Just explain what those were—what those accounts were, whether or not the statement shown on page 30 are the accounts that you were to pay.

A Yes, sir. We were to pay the liabilities—Sanborn Cutting Company were to pay the liabilities of the Kake Packing Company, as shown on page 30, amounting to \$72,681.81. That was the consideration for the execution and delivery of these two instruments, Plaintiffs' Exhibits "64" and "65." There was no other consideration; just merely the liabilities. We purchased the plant for the liabilities, as shown on this statement.

Q. Now, did you pay these amounts?

A. Yes, every one of them.

Q. Have you got a voucher showing payment of them?

A. I think we have a voucher showing payment of each one of them. Do you want to show in addition to that what others we have paid?

Q. Yes, take up each item. For instance, the first item there is Astoria Iron Works, \$1228.15.

A. It is voucher 2910 and 3597. In place of paying \$1228.15 we paid in all \$1327.86; that was interest against the account up to May 11th.

Q. Now, what is this document I hand you?

A. It is a voucher of the Sanborn Cutting Co. with check attached; canceled check, showing payment of \$1301.83; voucher 2910; \$26.03, voucher 3597.

Q. That was payment to whom?

A. That is payment to Seattle Iron Works, of \$1327.86.

Q. This is Seattle-Astoria Iron Works, while the bill——

A. The original bill is Astoria Iron Works; that is what fooled us.

Q. Just explain why that was drawn to the Seattle Astoria Iron Works.

A. The original account was the Astoria Iron Works, formerly an Astoria corporation; they moved to Seattle and changed the name to Seattle Astoria Iron Works.

MR. CROSSLEY: You have two accounts, one for \$1301.83 and the other for what?

A. One for \$1301.83, and the second for \$26.03; that makes the \$1327.86.

Q. What are you looking for, Mr. Sanborn?

A. I want vouchers No. 2910 and 3597.

Q. What is that?

A. Do you want to check this over again?

Q. Yes.

A. Vouchers 2910 and 3597.

Q. Yes, what is that?

A. Seattle Astoria Iron Works.

Q. You explained that once. What is that? What is this paper I hand you now?

A. Voucher Sanborn Cutting Company.

Q. Explain to the Court what that is.

A. The Seattle Astoria Iron Works was in two payments. Shall I go over that again?

Q. No. I just wanted to show what the voucher was.

A. They show the Sanborn Cutting Company's actual payments with canceled checks attached.

Q. Whose check is that?

A. Sanborn Cutting Company's canceled check.

Q. Was that actually paid?

A. Yes, sir.

Q. That check came back?

A. Came back from the bank.

Q. All right; we will offer that later on. Take them right through. That takes the Astoria Iron Works, two items. The next is Pacific Coast Steamship Company.

Q. Explain to the Court how this happened to be in this shape.

A. We keep the Sanborn Cutting Company on voucher system entirely, and issue vouchers as we make payments, signed — certified by our accountant and approved by me, and then the canceled checks received from the bank after payment, are attached to the voucher and filed in our papers.

Q. What position did you and do you occupy in the Sanborn Cutting Company?

A. President.

Q. What other?

A. General manager.

Q. All right; the next check is Pacific Coast Steamship Company. It shows here \$1419.67.

A. We will have to check that through by items. There are other payments — I may explain there are other payments in these vouchers in addition to the old accounts. That is the old Kake accounts. Payments for Sanborn Cutting Company either for Kake or Astoria plant included in the same vouchers.

Q. What do you mean by Astoria plant?

A. Astoria cannery; Sanborn Cutting Company's Astoria cannery, but the vouchers show the accounts the payments were made on.

MR. CROSSLEY: But the check covers not only for the Kake Packing Company but for the Sanborn Cutting Company at Astoria.

A. Covers whatever payment we made at that time.

MR. CROSSLEY: I mean the account.

A. The check will include the payment for the old Kake Packing Company account, and in addition to that any payments we made on any accounts they were carrying at that time. \$19.67 is the old account, one item.

Q. Is that the voucher there?

A. That is the voucher for the Kake Packing Company.

MR. FULTON: I think it would be satisfactory, probably, for me to ask this witness straight out how much money he paid and introduce these vouchers and say there they are.

COURT: Very well.

MR. FULTON: All right; I will shorten this matter up a great deal.

Q. Mr. Sanborn, did the Sanborn Cutting Company pay the bills payable of the Kake Packing Company in accordance with the contract of purchase?

A. Yes, sir.

Q. How much money did the Sanborn Cutting Company pay as a consideration for the transfer to it of the assets of the Kake Packing Company. How much money?

A. You mean the liabilities of the Kake Packing Company as originally inventoried, or the total?

Q. How much did you pay?

A. \$81,177.18.

Q. How was that paid.

A. It was practically all, with the exception of, I think, three items, paid in cash.

Q. Did you pay the claim of the Astoria Iron Works for \$1228.15?

A. We paid the claim of the Astoria Iron Works for \$1228.15, and an additional amount of interest.

Q. How much was that?

A. Amounting in all to \$1327.86.

Q. Was that the actual amount due the Astoria Iron Works from the Kake Packing Company?

A. Yes.

Q. Did the Sanborn Cutting Company pay the American Can Company?

A. Yes, sir.

Q. Its claim?

A. Yes, sir.

Q. Of \$10,507.65?

A. We paid altogether the American Can Company for the Kake Company; that included the \$10,507.65, and in addition to that interest and other charges bringing the total up to \$11,129.00.

Q. That interest was paid to what time?

A. Up to May 11th. This is all—the interest is all included up to May 11th, the date of the transfer, only.

Q. And when you are referring to interest on these accounts having been paid, to what date was it paid?

A. May 11th, the date of the transfer.

Q. Have you charged them any interest subsequent to May 11th?

A. No, sir; also I want to say in the matter of the American Can Company, there was an additional \$100.00 which was due them for rental of two machines, not included in the Kake books, included in this \$11,-129.00.

Q. Now, that account of bills payable, what did those bills payable consist of?

A. They consisted of fifteen thousand dollars due the First National Bank of Portland. That included an error on the books that I stated; instead of thirty-four—

Q. \$3481.70?

A. Was that the amount? Thirty-four hundred—you know that, I haven't it. It included that error, the \$15,000.00 If you will give me the ledger I can tell the amount due the First National Bank according to the Kake books. That included the error of \$3481.70, making the total payment to the First National Bank of Portland \$15,000.

MR. ROBERTSON: I don't understand, Mr. Sanborn, the three thousand is in the \$15,000?

A. Yes, sir, that is what I said just now. That included the error.

Q. And the total then that you paid——

A. Just a minute; the books here as originally turned over by Mr. Kirberger, and the accountants, showed the First National Bank, due them, \$11,518.30.

Q. As a matter of fact, what was the indebtedness?

A. \$15,000.00.

Q. Who paid that?

A. Sanborn Cutting Company in cash.

Q. When was that paid.

A. I have to have the canceled notes to testify to that.

Q. The vouchers we introduced show the dates?

A. Yes, sir, they show the dates of all payments.

Q. What other items were included in statement of bills payable?

A. S. S. Gordon, \$5000.00.

Q. What was that for?

A. Cash borrowed by the Kake Packing Company.

Q. What else, Mr. Sanborn. Did the Sanborn Cutting Company pay Gordon that sum?

A. Yes, sir.

Q. You have a voucher for that, have you?

A. Yes, sir, vouchers and canceled notes.

Q. What other?

A. American Can Company note, \$3841.54.

Q. Note of whose?

A. Kake Packing Company.

Q. Who paid that?

A. We did.

Q. When you say "we" you mean who?

A. Sanborn Cutting Company.

Q. Have you voucher for that?

A. We have canceled note.

Q. What other item is included in the twenty-three thousand?

A. That makes \$23,841.54 shown on the bills payable account instead of \$20,359.84.

Q. And Sanborn Cutting Company have here in court vouchers for these?

A. Yes, sir, canceled notes and vouchers.

Q. That covers all——

A. Bills payable.

Q. Now, F. P. Kendall, \$4160.35?

A. The F. P. Kendall account as revised showed \$4871.19. That included the interest up to May 11th.

Q. Who paid that?

A. The Sanborn Cutting Company paid that by transferring on the Sanborn Cutting Company's books from the Kake Packing Company to Mr. Kendall's personal account.

Q. Just explain how that transfer was made?

A. I have got the books here.

MR. FULTON: Do you gentlemen want the books or will it be satisfactory to have Mr. Sanborn make the explanation?

MR. ROBERTSON: All right, let him explain.

MR. FULTON: If you wish the books are here for your inspection.

Q. Just explain.

A. We transferred the account charging the Kake plant \$4871.19 and credited Mr. Kendall's personal

account with that amount on the Sanborn Cutting Company's books, which he could draw at any time.

Q. Did Mr. Kendall agree to that?

A. Yes, sir.

Q. That paid what?

A. That paid the \$4871.19.

Q. And Mr. Kendall accepted the Sanborn Cutting Company for that?

A. Yes.

Q. All right. George W. Sanborn & Son, \$31,010.88.

A. The George W. Sanborn & Son account, on the date of the transfer, showed \$31,010.88; that is the date of the transfer; that is May 11th.

Q. On whose books?

A. George W. Sanborn & Son's books; also on the Kake Packing Company's books as revised. This change was made by additions paid by them for insurance and some of the accounts that were paid; and also credit to the Kake Packing Company for whatever salmon had been sold up to that date, so that the balance on the—excuse me, I said the Packing Company's books; the balance on the Kake Packing Company's was \$31,010.88; the George W. Sanborn & Son's books showed \$11,010.88, and \$20,000 due the Astoria Savings Bank, which I testified to yesterday. The \$11,010.88 was paid by transfer on the Sanborn Cutting Company's books giving George W. Sanborn & Son credit for \$11,010.88 and charging the Kake plant, which they agreed to. The \$20,000 was paid to the Astoria Savings Bank; we have the cancelled notes for that \$20,000; that shows total payment of \$31,010.88.

Q. These transfers of accounts were satisfactory to Sanborn & Son?

A. Yes, perfectly.

Q. And the Sanborn Cutting Company?

A. Yes, sir.

Q. The Sanborn Cutting Company is solvent, is it not?

A. Yes, sir.

Q. And so are George W. Sanborn & Son?

A. Yes, sir.

Q. And were solvent at that time?

A. Yes, sir.

Q. Now, Fred Coles.

A. Fred Coles; the statement of liabilities as turned over by the Kake Packing Company shows \$808.42. There was an error in that account. The amount paid Fred Coles was \$702.07. That was paid by three checks, one for \$100.00, one for \$50.00 and one for \$552.07. We have his receipt in full. That difference was fish that the Kake Packing Company had credited to Mr. Coles that he had caught during the time that he was drawing salary from the Kake Packing Company.

Q. Did the Sanborn Cutting Company pay that?

A. No, sir.

Q. Who did?

A. It was an error. It should not have been credited to him at all.

Q. I mean the Sanborn Cutting Company paid the seven hundred?

A. The Sanborn Cutting Company paid \$702.07.

Q. You have vouchers for it?

A. Yes, I have just said we have three vouchers and cancelled checks.

Q. Fisher Brothers is \$667.80.

A. Fisher Brothers, \$667.80; we paid them \$712.60; that included the interest to May 11th; we have the cancelled check; that is Sanborn Cutting Company paid it; we have the cancelled check and voucher.

Q. Here?

A. Yes, sir.

Q. George E. James Company.

A. George E. James Company?

Q. \$880.15.

A. \$880.15; that was paid by two amounts; one for \$500.00 and one for \$380.15, by the Sanborn Cutting Company. We have the voucher and cancelled checks.

Q. Then there is F. N. Kendall, who is that?

A. That is Mr. Kendall's son.

Q. That is the boy that lost his girl.

A. That is the boy that lost his girl; that was for labor, \$115.53. That was paid by the Sanborn Cutting Company; we have the voucher and cancelled checks.

Q. Charles McConaghy. It is only \$10.00 anyhow.

A. \$10.00.

Q. Did Sanborn Cutting Company pay that claim?

A. Yes, sir, that was paid by our voucher No. 89.

Q. Seattle Hardware Company, \$515.29.

A. That was paid by our voucher No. 2910; total amount of that payment was \$537.79; that included the interest to May 11th; that was paid by the Sanborn Cutting Company.

Q. That is May 11, 1914?

A. May 11th, 1914. Well, it is all May 11, 1914, the date of the transfer.

Q. Now, Schwabacher Brothers.

A. Schwabacher Brothers, \$8.58; that was paid by our voucher No. 2910, Sanborn Cutting Company's voucher.

Q. Sanborn Cram Company, \$20.46.

A. \$20.46. That was paid by transfer. I will have to explain here that George W. Sanborn & Son act as agents for Sanborn Cram Company; which is another cannery that we have in Alaska, and that payment of \$20.46 was paid by transfer to the credit of George W. Sanborn & Son, who in turn credited the Sanborn Cram Company; both of our books are here showing that transfer, which they accepted.

Q. Standard Oil Company.

A. Standard Oil Company was \$779.37. Paid by three checks—two checks; voucher No. 2666, \$400.00; 2910, \$115.37, and a return of 33 empty carboys which they gave us credit for \$264, making in all, \$779.37, which they accepted in full payment.

Q. Have you voucher for that?

A. We have these two vouchers No. 2667 and 2910 and I think we have the credit, haven't we for the empty carboys. The last check has the item right on it, of the return stub here.

Q. A. V. Snell.

A. A. V. Snell, \$118.87. That was paid by our voucher 1551; paid in full.

Q. E. Weise, Hotel Western, Peterburg, \$10.00.

A. That was paid by voucher No. 91, \$10.00.

Q. Any other claim?

A. Well, there is the Pacific Coast Steamship Company.

Q. We had that once.

A. No, you only had one item of it.

Q. Oh, I thought we did.

A. I only testified to \$19.67 of that. In addition to \$19.67 we paid voucher No. 2668, \$1400.00; voucher No. 2339, \$1.10; voucher 3756 \$12.40, making in all a payment of \$1433.17 which was an additional payment to them of \$23.30, that is additional over the liability statement. That was caused by some items not credited to them on the Kake Packing Company's books, and which we paid.

Q. Now, were there any other liabilities of the Kake Packing which you assumed which were not included in the statement?

A. Yes. Do you want them itemized?

Q. Items and refer to your vouchers for them.

A. We paid on account of interest on notes up to May 11, 1914, \$1781.39; that is not included in the original liabilities of the Kake Packing Company. I can give you the items and voucher numbers on that, if you wish.

Q. Better do that.

A. It shows on this statement.

MR. FULTON: All right; we will offer the statement. I think that will expedite matters, and give you a chance to cross examine; we will give you copy of the statement:

A. Shall I begin?

MR. ROBERTSON: I understand you are going to put the statement in; that is all right.

Q. Anything else, Mr. Sanborn; any other? For instance, government tax.

A. Just a minute, Mr. Fulton and I will give it to you right as it comes. I want to check off.

Q. That is good, if you have it on there.

A. I have it all here. Exchange of old salmon drafts—

Q. What is that?

A. \$4.90. That was paid to the bank; we have vouchers for that.

Q. Have you the number of your voucher there?

A. Vouchers 1651 and 1532. License, 1913, pack of the Kake Packing Company, which was not included in the list of the Kake Packing Company liabilities; this we paid to the government; that is voucher No. 3070, \$921.04. Money order fee on above license, voucher No. 3140, \$2.82. Peterburg Meat Market, voucher 88. This is an account they claimed was bought by the Kake Packing Company, and which we afterwards corresponded about and found we should pay \$3.05. Tongas Trading Company, voucher 3204, \$9.30; same as Petersburg Meat Market; doesn't show in the liabilities of the Kake Packing Company. Seattle Hardware Company, some winches that were bought by the Kake Packing Company, afterwards returned to the Seattle Hardware Company and charged in the Kake Packing Company books to the Seattle Hardware Company, but they would not accept the winches

and insisted on payment, so we paid them \$87.50 and took the winches, which are worthless.

Q. You say they are worthless?

A. Yes, we still have them on hand; they can't be used. Interest on Gorge W. Sanborn & Son's open account up to May 11, 1914, \$261.20 Sundry charges against inventory paid by George W. Sanborn & Son between taking of inventory and sale to Sanborn Cutting Company. Do you want these items?

Q. I guess you had better.

A. Insurance premium \$380.75.

Q. And your vouchers, whatever they are.

A. It will all be in one payment, a credit to George W. Sanborn & Son; freight charges, C. B. Huiett, voucher 1480, \$18.55; telegrams, vouchers 1496 and 1497, \$5.15; long distance phones, voucher 1578, \$3.18; freight on tierces, voucher 1533, \$146.13, icing charges, vouchers 1561 and 1612, \$13.39; labelling, Seattle, \$29.77, making in all \$596.92.

Q. What were these various items paid for, on what account?

A. The Kake Packing Company; on the stuff that was carried over. On their assets, canned salmon and tierced salmon.

Q. All right. Is there anything else?

A. I think that covers the whole.

Q. Now, you spoke of vouchers covering the payment by the Sanborn Cutting Company of these various amounts of money that you have just testified to. I ask you to examine these documents, Mr. Sanborn, that I now hand you and state whether or not those

are the vouchers that you referred to, and just take them up briefly.

A. These are the cancelled notes; do you want me to itemize these?

Q. Well, just simply; those are the cancelled notes?

A. There is one thing I should testify, that the payment to the American Can Company—so that this is all clear—on their note of \$3841.54; this was paid, by the consent of the American Can Company, in returning to them the can making machinery which we had at Kake.

Thereupon, counsel for defendants offered said cancelled note in evidence, and the same was received and read in evidence and is hereunto attached, marked Defendants' Exhibit "G," and made a part hereof.

Q. That reduced the assets of the Kake Packing Company that we took over so much, when we returned the machinery, on payment of \$100.00.

MR. ROBERTSON: No outlay of the Sanborn Cutting Co.?

A. Yes, outlay of thirty-eight hundred.

MR. ROBERTSON: Assets received of the Kake Packing Company?

A. Yes, sir.

MR. ROBERTSON: Paid with assets.

A. Were paid with assets of the Kake Packing Company. Here are three notes of the First National Bank of Portland, \$5000.00 each.

Q. That is voucher Number what?

A. If you are going into that—

Q. I thought you had it there.

A. No, there is the cancelled notes; they speak for themselves.

Thereupon, counsel for defendants offered said three notes in evidence, and the same were received and read in evidence, and are hereunto attached, marked Defendants' Exhibit "H," and made a part hereof.

A. They were paid at different dates; the notes themselves show the dates they were paid. They are signed Kake Packing Company, F. P. Kendall, and are resigned F. P. Kendall and George W. Sanborn & Son.

Q. They sign as principal.

MR. ROBERTSON: The notes were not paid, Mr. Sanborn, until as late—the first one was paid June 9, 1914; the next was paid October 3, 1914, and the next September 28, 1914.

A. The notes themselves show when they were paid, the endorsements on the notes.

MR. ROBERTSON: Carried them for some time though after. However, they were paid by your check, not Kake Packing Company check?

A. Paid by Sanborn Cutting Company. They were not paid by the Kake Packing Company; none of these payments were made by the Kake Packing Company; all made by the Sanborn Cutting Company.

Q. Are you in the habit of carrying fifty or sixty thousand dollars cash around with you?

A. It might be well to say at this time, we haven't cleaned all up until lately, because eighty-one thousand dollars is quite a lot of money to pay out especially when we are doing business the same as before, but we have got them all paid up; everything is paid; the entire indebtedness of the Kake Packing Company, now.

MR. FULTON: I shall not read these documents but I understand they will be considered as read.

A. Here are four notes of S. S. Gordon for \$1250.00 each.

Q. Of the Kake Packing Company?

A. Of the Kake Packing Company—wait just a minute; two of these notes are paid in cash, the last two notes are not due yet; one is due July 15, 1916; the other is due July 15, 1917; they are paid by notes given by the Sanborn Cutting Company to take up these two notes; they are endorsed over to the Sanborn Cutting Company; shows payment to the bank, however.

Q. Sanborn Cutting Company paid the bank?

A. Sanborn Cutting Company paid the bank but they paid them that way; the notes speak for themselves.

Thereupon, counsel for defendants offered said four notes in evidence, and the same were received and read in evidence, and are hereunto attached, marked Defendants' Exhibit "I," and made a part hereof.

A. They were paid when due; the two notes were paid as they fell due, and the other two notes were taken up by new notes of the Sanborn Cutting Company.

MR. ROBERTSON: Do you have with you, Mr. Sanborn, the original transaction by which these notes happened to be given to Mr. Gordon?

A. What do you mean?

MR. ROBERTSON: The original book entries.

A. Why it is in the Kake books here; there were four notes given for—my remembrance of that was that Mr. Gordon had loaned the Kake Packing Company \$5000—that is the First National Bank of Astoria had loaned the Kake Packing Company and when the Kake Packing Company got very heavily involved, Mr. Gordon took the notes to the First National Bank of Astoria over to his personal account, and in order to assist the Kake Packing Company said: “Here we will take four notes which will come due in one, two, three and four years.” If I remember right, that is the transaction. The original loan was made by the First National Bank of Astoria where Mr. Gordon is cashier, and when there was any question came up as to whether or not the Kake Packing Company was good, rather than to have any question with the bank, he took the notes to his personal account.

MR. ROBERTSON: Was that about the time Mr. Gordon conveyed his stock to you?

A. What stock?

MR. ROBERTSON: This \$5000.00 worth of stock?

A. \$5000.00?

MR. ROBERTSON: Yes, didn't he have fifty shares of stock?

A. He had more than fifty; he had six thousand—let's see; why the books show how much Mr. Gordon had. I can't testify without looking at it; that has never been conveyed. We merely had an option to purchase; Mr. Gordon lost his stock the same as the balance of us did.

MR. ROBERTSON: Those notes were not given back?

A. No, sir.

MR. ROBERTSON: Didn't the Kake Packing Company buy that stock back from Mr. Gordon and give those notes?

A. No, sir.

MR. ROBERTSON: Postive of that?

A. No, sir, an actual loan made by the First National Bank as I testified; the books of the Kake Packing Company show it; they will show the transaction right here; here, it shows four notes right here—right in bills payable account.

Q. What page?

MR. ROBERTSON: What page?

A. Page 3 of Defendant's Exhibit "F;" here are the four notes, original notes, First National Bank, and taken up by notes given Mr. Gordon of \$1250.00 each, due in one, two, three and four years, 1914, '15, '16 and '17.

MR. ROBERTSON: Have you the original notes, the notes taken up by the new ones?

A. I imagine in the Kake books somewheres. I have got the journal here which will explain them.

MR. ROBERTSON: You have the journal—of what?

A. The Kake Packing Company; here it is; Bills payable to Bills Payable, “four notes of \$1250.00 each given in favor of S. S. Gordon in exchange for one \$5000.00 note in favor of the First National Bank; these four notes due as follows: July 15, 1914, \$1250.00; July 15, 1915, \$1250.00; July 15, 1916, \$1250.00; July 15, 1917, \$1250.00.”

Thereupon, counsel for defendants offered the journal of the Kake Packing Company, page 99, in evidence, and the same was received and read in evidence, and is hereunto attached, marked Defendants’ Exhibit “J,” and made a part hereof.

MR. ROBERTSON: Two notes then are not due as yet and haven’t been paid as yet?

A. They have been paid; they have been paid by notes of the Sanborn Cutting Company.

MR. ROBERTSON: The Sanborn Cutting has not paid the money but has simply given notes.

A. As far as the notes of the Packing Company Company are concerned, they are paid; the notes show for themselves.

MR. ROBERTSON: Endorsed over to the Sanborn Cutting Company. Nothing whatever to show

the Kake Packing Company is not liable on those two notes, is there?

A. Yes, they are, right there.

MR. ROBERTSON: Where do you find that?

A. Simply says "Pay to the order Sanborn Cutting Company without recourse, S. S. Gordon."

MR. ROBERTSON: Do you mean to say the Kake Packing Company is not still liable?

A. I can endorse Sanborn Cutting Company, and mark them paid, if you want to.

COURT: I don't think that is necessary; the Packing Company is not in court.

A. Well, will you allow me to endorse them and mark them paid by Sanborn Cutting Company?

Q. (Mr. Fulton) Yes, do it right now.

A. That will show the payment. I have full authority to do it.

MR. FULTON: That will show the payment. We don't care, your Honor, whether the Kake Packing Company is here. We don't expect the Kake Packing Company to pay us.

(Witness endorses notes.)

Q. Now, that satisfies the gentleman.

A. We have the original note of the First National Bank for which these four notes were issued.

Q. That is the one that counsel asked you about, whether or not Mr. Gordon had not been paid back that money.

A. Yes, sir, that is due July 2, 1912, \$5000.00.

Thereupon, counsel for defendants offered said note in evidence, and the same was received and read in evidence, and is hereunto attached, marked Defendants' Exhibit "K," and made a part hereof.

A. The four notes of \$1250.00 each were given in payment of that note.

Q. Now, take up the next voucher you have there.

A. The next is four notes which we paid to the Astoria Savings Bank, Astoria.

Q. That is the one you referred to there?

A. These notes show \$20,000; the item of \$20,000, George W. Sanborn & Son account.

Q. Those are the ones you referred to as having been paid?

A. Yes, sir, these are the cancelled notes and vouchers. These were paid——

Thereupon, counsel for defendants offered said notes, together with the endorsements on the back of each, and the cancellation, in evidence, and the same were received and read in evidence, and are hereunto attached, marked Defendants' Exhibit "L," and made a part hereof.

A. I think the dates are stamped on there, the dates of each payment.

MR. ROBERTSON: The notes, I understand, Mr. Sanborn, were——

A. They are notes of the Kake Packing Company.

MR. ROBERTSON: At the time of the negotiation of the notes, you and Mr. Kendall endorsed them as security. Is that the idea?

A. We guaranteed the payment. The guarantee is on the back.

MR. ROBERTSON: I understood you to say something about George W. Sanborn & Son.

A. That is the First National Bank of Portland; that was on the \$15,000 note; that is another lot. Those are all in evidence.

Q. Now, your next one.

A. You want the vouchers right along, right down the line?

Q. Yes, right along.

A. Some of these payments were made through our Ninth Street Office, George W. Sanborn & Son, and some through our own office.

MR. FULTON: Here is copy of that statement.

Q. Have you lost the statement?

A. The statement shows voucher numbers.

Q. Have you checked up to know correct?

A. Yes, sir.

Q. Is that the summary of the vouchers?

A. That is the summary of the vouchers.

MR. FULTON: We will offer this summary in evidence together with the vouchers concerning which the witness has just testified.

A. Vouchers and cancelled checks.

Q. I will ask you this: Do you know the signatures attached to these divers documents and vouchers?

A. Yes.

Q. Are they the signatures of the parties that signed them there?

A. Yes, sir.

Q. Have you an extra copy you can give the court?

A. There is one you have there included in that lot, the one voucher for the Savings Bank.

Thereupon, counsel for defendants offered said statement and vouchers in evidence, and the same were received and read in evidence, and are hereunto attached, marked Defendants' Exhibit "M," and made a part hereof.

A. If anybody is going over these, I better explain to whoever is going over them, and check them off.

Q. What is the reason for that?

A. Simply because there are other items not connected with the Kake Plant at all, in these same vouchers.

Q. But your vouchers all show these particular items?

A. Absolutely all through.

MR. FULTON: If court or counsel desires, we will segregate it.

COURT: That is sufficient for the present.

MR. SANBORN CONTINUING:

I was acquainted with the cannery plant, machinery and assets of the Kake Packing Plant on May 11th and 12th, 1914. In my judgment, the fair market value of the assets of the Kake Packing Company on that

date, including the real estate, fixtures, cannery plant, machinery, and in fact the entire assets, including Bills Receivable, I would say from fifty to sixty thousand dollars. The Sanborn Cutting Co. actually paid therefor \$81,177.18.

Q. Now, at the time this \$8500 was assigned to you and Mr. Kendall, was there anything said to you or did you have any notice or knowledge that the Kake Trading & Packing Company was insolvent or otherwise.

MR. ROBERTSON: I object to that as a conclusion, if the court please. I think let him state what the facts are.

A. Oh, not, nothing. I knew nothing about it.

Q. Did you have any talk with Mr. Kirberger as to who owned the stock of the Kake Trading Company?

A. Mr. Kirberger always represented to me that he was sole owner of the Kake Trading Company, did from the start; from the organization of the Kake Packing Company. In regard to the assignment to Kendall and me of the claim of the Kake Trading Company against the Kake Packing Company, I always supposed it was a legitimate transaction until I was notified of this suit. Didn't think there was any question about it at all. Had Mr. Kirberger been successful in effecting a sale in line with the agreement of January, 1914, we would have stood to lose \$10,000 besides our stock. That was the contract we made with Mr. Kirberger.

Mr. Burwell subscribed for \$5000.00 stock in the Kake Packing Company originally through Mr. Kirberger, and when it came to payment, he said he couldn't meet the payment; in fact, the draft for the first payment went to protest; we drew on him, and Mr. Gordon, Mr. Kendall and myself had to take that amount in order to keep the capital intact of the Kake Packing Company, and did take it up, \$5000. In other words we were obligated to subscribe for \$5000 more stock. One inducement why we went into it was on account of Mr. Burwell. I do not blame Mr. Kirberger in the transaction. I am merely testifying how we were fooled.

As I recall it, the power of attorney to subscribe stock for Mr. Burwell was given to me and not to Kirberger at all. I did not know Mr. Burwell until I met him through Mr. Kirberger. I didn't know who he was at all. I may have dictated a telegram and sent it to Mr. Burwell to come in. I think it was stated, however, that the company was organized, and we understood that he was to subscribe so much stock. If there was such a telegram, I think we have it. The purchase of the assets of the Kake Packing Company was as straight fair business deal as ever I made and I have no reason to feel any different now. It was a question of the Kake Packing Company going into bankruptcy, or Mr. Kendall and I taking hold of it and paying the bills. That is all there was to it. If the Kake Packing Company had gone into bankruptcy, Mr. Kendall and I would have been obligated to pay between fifty and sixty thousand dollars.

Q. Has Mr. Paine, as trustee or otherwise, ever asked you for this 125 shares of stock, or any part of it?

To which plaintiff's counsel objected as immaterial, irrelevant and incompetent, which objection was overruled.

A. No, sir.

Q. Did Mr. Kirberger ever ask for it?

A. No, sir.

Q. Did anybody ever ask for it?

A. No, sir.

Q. Was any demand ever made upon you to reconvey or retransfer this assignment of \$8500 of the Kake Trading Company?

A. No, sir.

Q. Did Mr. Paine ever ask you for it, or Mr. Kirberger?

A. No, sir.

Q. When did you first hear there was any controversy concerning that.

A. When the papers were served in this suit.

CROSS EXAMINATION By Mr. Robertson:

Q. The first you ever heard of it was when the papers were served, you said?

A. When the papers were served in this suit. I don't remember of ever hearing from Mr. Kirberger about this personally, until Mr. Kendall told me that he met you (Mr. Robertson) in Portland and wanted a settlement; that is the first I remember of hearing about this suit at all—wanting to know if we would

not settle—compromise at all. That is the impression I got from Mr. Kendall.

Q. You don't mean to say you didn't get the original of that letter, do you (referring to letter which witness said "I don't ever remember of hearing from Mr. Kirberger")?

To which defendants' counsel objected as not the best evidence, which objection was sustained. Plaintiff's counsel then asked that defendants produce the original letter, and defendants' counsel stated if they had it or if it amounted to anything they would produce it.

Mr. Kendall and myself represented the Sanborn Cutting Company in the negotiations of turning over all the assets of the Kake Packing Company to the Sanborn Cutting Company. No one else represented the Sanborn Cutting Company. I knew what the statement of the liabilities of the Kake Packing Company showed, but I had no idea it would amount to as much as it did. Neither did I have any idea there were any errors in the books.

Q. You don't mean to give the court the impression that the Kake Packing Company, through yourself, Mr. Kendall and Kirberger, slipped something over the Sanborn Cutting Company, by which the Sanborn Cutting Company was compelled to pay some eight thousand dollars more liabilities than they expected to, do you?

A. Why, yes. I don't think any of it was done intentionally. I don't mean to infer that at all, or have

it inferred. I mean to say that the liabilities of the Kake Packing Company were a great deal more than I realized, that is that we thought we were compelled to pay.

Q. Now, you knew at that time, however, about a month or two at least, and probably from January 6th right up to May 11th, you knew that the Kake Packing Company by the sale of the assets to the Sanborn Cutting Company, which was contemplated, intended to go out of business, didn't you?

A. No, I won't say that I did. I said yesterday that I told Mr. Kirberger that it was either one thing or the other; he would either have to arrange for finances and purchase or we would; that I would not continue with the management as it had been.

Q. With the management under Mr. Kirberger?

A. No, sir—yes, sir.

Q. Do you mean to say that you, on January 6th, and from there on had absolutely made up your mind that you would not in any way have anything further to do with the Kake Packing Company if Mr. Kirberger had anything to do with it?

A. Absolutely I did, and I so stated to Mr. Kirberger.

Q. Said what to Mr. Kirberger?

A. That under his management we would not continue. He understood that in fall—in the fall.

Q. The fall before?

A. Yes, after his return from Alaska.

Q. And do I understand you to say it was a question of either you getting out, you and Kendall, leav-

ing the Kake Packing Company, or Kirberger getting out and leaving the Kake Packing Company to you?

A. Unless he could raise sufficient funds to keep up his end, in which case there would be other arrangements; another manager put in and he so understood it.

Q. At the time, I understood you to say, that you didn't consider your stock worth anything; the stock in the Kake Packing Company was worthless?

A. Absolutely. I proved it was.

Q. You proved it to be?

A. Yes, sir.

Q. Now, your assignment, when you made the assignment you wanted Mr. Kirberger—you gave Mr. Kirberger an option to buy 170 shares of the value of \$17,000 for \$65,000; isn't that true?

A. I did what?

Q. You gave Mr. Kirberger an option to buy 170 shares of the par value of \$17,000 for \$65,000?

A. No, I gave him an option to purchase the Kake Packing Company with the liabilities paid, and throw our stock in, so the option I gave him for nothing; take off \$10,000; pay the liabilities and lose \$10,000 besides the stock was the proposition I made him—made. Mr. Kirberger. In other words, we were perfectly willing to lose \$27,000 and get out of it. The liabilities at that time showed eighty-five thousand—about eighty-five, as I remember it. Seventy-five, as I remember it, we agreed to sell for \$65,000 including our stock.

Q. You don't mean to state, Mr. Sanborn, that that written assignment contained any such agreement as that, do you?

A. Most assuredly I do; we were already responsible for over sixty thousand dollars, and we agreed to pay ten more.

Q. In that assignment?

A. In that assignment; we were responsible; we were on the notes of the Kake Packing Company.

Q. I want a copy of it, for I would like to have you point out where you make that statement out. I am frank to say I can't.

A. You will have to have it go with the original list of liabilities Mr. Kirberger put in here; that will show the whole transaction; we were endorsers on paper and guaranteed the accounts; let me have that original list that Mr. Kirberger made out at the same time—the liabilities; the one he claimed was made in January.

Q. Now, where do you find anything in Plaintiff's Exhibit "59" that refers to that?

A. How do you mean? Refers to what?

Q. That in any way makes that one paper—

A. I am saying what the agreement was; what the understanding or verbal agreement; that is the agreement and the whole agreement.

Q. Verbal agreement; I am asking about the written agreement.

A. Mr. Kirberger will testify to the same thing; this included that we were responsible for sixty-seven thousand that we had guaranteed and endorsed and ten thousand which we proposed to pay, which figures about seventy-eight thousand dollars which we agreed to sell for \$65,000.

Q. Where do you agree to sell? Just find that in that paper where you agree to sell for any \$65,000.

A. Right here. "On payment to us of \$65,000."

Q. All right; go ahead and read the rest of it.

A. Didn't we agree to pay the ten thousand here?

Q. No, you certainly don't. I would like to have you point it out.

A. Wait a minute, give me time. That was the understanding anyway.

Q. The understanding was not put in writing. Wasn't that true?

A. I say the understanding was that we were to pay the liabilities and sell to him for ten thousand less.

Q. You answer my question. That understanding wasn't put in writing at that time, was it?

A. Here is what was put in writing at that time.

Q. Here is what was put in writing.

A. With the exception of the transfer—

Q. With the exception—

A. Wait a minute; let me read it. With the exception of the transfer of \$8500.

Q. With the exception of this transfer, Plaintiff's Exhibit "61," where Ernest Kirberger, President and Manager of the Kake Trading & Packing Company, assigned to you the \$8582.21 account, that was the only writing made by you at the time of that other assignment of the 125 shares of stock?

A. I think those are the two only ones. I won't be sure. I don't think any other.

Q. You point out to me where, in either one of those writings, there was any assumption of any liabilities, or where anything to pay except you were to get \$65,000 for stock worth \$17,000. If you just point that out to me.

MR. FULTON: Of course, this is all construction of writing. Here is the writing I call the witness' attention to, with the court's permission, of March 21st, that makes that explanation that Mr. Sanborn makes, to Mr. Kirberger. I submit this to the witness and will ask him to look at this at the same time.

MR. ROBERTSON: I am talking about January 6, 1914.

A. I have testified to what my understanding was.

Q. That understanding was not set forth in writing on January 6, 1914, was it?

A. This is the writing, the only writing with reference to that, but the understanding was that we were to pay—that is we were responsible, or we agreed to pay this amount. In addition to that, we agreed to pay ten or eleven thousand dollars and sell it to Mr. Kirberger; that was the proposition—and sell it to Mr. Kirberger for \$65,000, taking off ten thousand dollars.

Q. You told Mr. Kirberger that orally; you didn't out it in writing, did you?

A. That was our agreement between the two of us.

Q. You didn't out it in writing?

A. I put in writing as near as I knew how; this is it.

Q. This is it?

A. This is it.

Q. Let me call your attention to what it says.

A. I know what it says; I read it.

Q. Did you make any advancement and if so where are the entries in your book where you made any advancement, either you or Mr. Kendall, for the account

of A. C. Kirberger or Ernest Kirberger, during the years of 1913—

A. Do you mean personally or the Kake Packing Company?

Q. I mean what you say, A. C. Kirberger and Ernest Kirberger.

A. That was the understanding, to keep up their end.

Q. There was no money advanced to A. C. Kirberger or Ernest Kirberger?

A. I didn't advance A. C. personally any money, nor Ernest Kirberger.

Q. Then that statement in there is incorrect?

A. No, sir, it is not incorrect; for their account to the Kake Packing Company; they were supposed to keep up their end; they were larger stockholders than we were in the Kake Packing Company.

Q. You didn't consider when Ernest Kirberger was carrying the account in his store, the Kake Trading & Packing Company, and sold you stuff at cost amounting, at that time, to \$10,333.31—you didn't think that was keeping up his end, did you?

A. Well, we were keeping up a whole lot more; about \$60,000.

Q. Yes, and you were getting insurance commissions; you were getting commissions on your fish, weren't you?

A. I was getting commissions for labor performed.

Q. Was Mr. Kirberger getting anything?

A. He had no arrangement for getting anything—no commission.

Q. Didn't he have an arrangement for being paid \$150.00 salary?

A. It was his own fault if he didn't get it; he was manager.

Q. It was his own fault?

A. Absolutely. If he didn't draw his salary, and didn't credit it, it was his fault, not mine.

Q. You don't consider that was keeping up his end?

A. I may answer the question, if he didn't it was like a great many other things he didn't do; he was lax in that respect.

Q. You don't consider, if he didn't take his \$150 a month, amounting in the two years to \$3600, that wasn't something towards keeping up his end, do you?

A. I didn't know he hadn't taken it until I got hold of the books.

Q. You didn't know it?

A. No, sir.

Q. Do you mean to say the books were not in your possession during the winter months?

A. I never looked in the Kake Packing Company books, to my knowledge, until we started to find out how much the Kake Packing Company owed.

Q. You never looked at them at all?

A. No, sir.

Q. In no respect?

A. No, sir. I don't remember ever looking into the books. I didn't keep the books of either the Sanborn Cutting Company or the Kake Packing Company.

Q. Now, in this date, you put in here: "Upon the payment of said sum of \$65,000 as above mentioned, said F. P. Kendall and George W. Sanborn, hereby agree to assign and transfer to Ernest Kirberger or his order those certain shares of stock in the Kake Packing Company, hereinbefore mentioned, to-wit: 125 shares in the name of Ernest Kirberger, and 60 shares in the name of A. C. Kirberger; and furthermore to assign and transfer to Ernest Kirberger or to whom he may designate, one hundred and seventy shares of stock of the Kake Packing Company now standing on the books of the company as follows: F. P. Kendall, 85 shares; George W. Sanborn, 85 shares." Now, that is what you were selling for \$65,000 according to your writing?

A. No, sir, I testified to what I was selling.

Q. It wasn't in writing, though, was it?

A. You have the only writing there; you can judge yourself.

Q. Certainly, and you didn't make any writing on the proposition until March 21st, 1914, which you put in evidence?

A. I made that writing right there; the one you have in your hand.

Q. Any writing other than this?

A. I did not.

Q. For the \$65,000?

A. Not that I remember of.

Q. No. Until March 21, 1914, after Mr. Kirberger had been back east and that had notified him you were putting a deal over on him. Isn't that correct?

A. How do you mean, putting a deal over on him?

Q. That you were not treating Mr. Kirberger squarely, the Kake Packing Company; you were defrauding him to put it in language of the underworld?

A. I think your own witness testified I did treat him squarely.

Q. My own witness.

A. Mr. Kirberger, yes. I don't think any question came up but I have treated him squarely from start to finish.

Q. You don't see any?

A. No, I don't think he testified to it either. I don't think you can get him to testify to it.

Q. What did the Kake Trading & Packing Company get out of that assignment of 125 shares? What did the Kake Trading & Packing Company get?

A. Mr. Kirberger was the company.

Q. What did the Kake Trading & Packing Company get?

A. Mr. Kirberger was the Kake Trading & Packing Company.

Q. What did the Kake Trading & Packing Company get?

Q. Pardon me. What did the Kake Trading & Packing Company, not Mr. Kirberger, but the Kake Trading & Packing Company get?

A. Excuse me, but Kirberger was the Kake Trading & Packing Company; the same as Mr. Kendall and I are the Sanborn Cutting Company. If Mr. Kirberger got anything, the Kake Trading & Packing Company would get.

Q. The Kake Trading & Packing Company got nothing out of it; isn't that true?

A. I have explained the way it worked.

Q. Isn't that true, the Kake Trading & Packing Company got nothing?

A. If Mr. Kirberger got anything they did; they got exactly what he got.

Q. Mr. Kirberger didn't get anything did he?

A. I don't think—he had an option to purchase; if he made his deal, he was to get out stock, all liabilities paid for ten thousand dollars less than what the supposed liabilities were at that time.

Q. Let me ask you this; How do you conceive that the Kake Trading & Packing Company would have got anything out of that when they had to put in \$65,000 new money? Weren't the assets and stock to go to whoever the men in the east were that raised the money?

A. I don't know what his deal was with the men in the east.

Q. You don't know?

A. No, sir.

Q. Not whatever?

A. No, sir.

Q. What consideration did the Kake Trading & Packing Company get for the assigning of the account of \$8582.21, which was made on that date?

A. They got an option by Mr. Kirberger getting an option on the plant for ten thousand dollars less than the liabilities shown, which we were to pay, and Mr. Kendall and my stock free, outside of that.

Q. Well, but where does that—

A. You have the paper right there; that is the whole thing.

Q. No, no, I mean what assignment. You have it there; I mean this assignment, Plaintiff's Exhibit "61."

A. That is what I meant; that is part of the contract right there; it is all one; all made the same day and each refers to the other one.

Q. Never put under the same cover or in any way made a part of the same paper?

A. Oh, no, no.

Q. And the Kake Trading & Packing Company actually got nothing out of that, did they?

A. I have already testified to what I consider they got.

Q. Simply you consider that Ernest Kirberger got an option.

A. Both the Kake Trading Company and—whatever it was—Kake Trading & Packing Company and Ernest Kirberger; it was all one; he has an option to purchase for \$65,000 which was ten thousand less than the liabilities which we agreed to pay, and our stock. In other words, he got \$27,500 if it was worth that.

Q. And when you got your payment you were going to be able to protect yourselves entirely on all the indebtedness that you and Kendall had pledged, isn't that true?

A. Less ten thousand dollars.

Q. Weren't you going to get \$65,000?

A. Yes, but the liabilities we were paying were \$75,000.

Q. Oh, they were \$72,000, weren't they?

A. No, \$75,000, according to this list, at that time. \$78,000 I think, to be close. Here is your list, right here; according to your list right here they were about \$78,000.

Q. The assets at that time were \$84,000?

A. No, no, never \$84,000 assets. That is an inflation of the assets.

Q. But you don't mean to say, Mr. Sanborn, that you didn't try to get \$85,000 from Kirberger the day before this was made.

A. No, sir; tried to get sixty-five.

Q. Do you mean to say you didn't try to get eighty-five?

A. No, sir. Never.

Q. Do you know whether Mr. Kendall did?

A. No, sir. I don't think he did. The whole talk that we had was we were perfectly willing to get out with a loss of ten thousand, and our stock.

Q. Would you be in position to say positively whether or not Mr. Kendall did or did not have such a conversation?

A. Mr. Kendall may have had another conversation with Mr. Kirberger that was entirely separate from mine.

Q. You know you didn't make any?

A. I know that was the original proposition that I made, that I would get out—if I could get out with a loss of ten thousand dollars and my stock, throw the stock in, I was perfectly willing to do it; that was the original agreement, original proposition that we made.

Q. Well, you don't mean to say, Mr. Sanborn, that you didn't know the Kake Trading Company was a corpoartion? You surely did.

A. I didn't say that, Mr. Robertson.

Q. Well, you understood that all along, didn't you?

A. I said Mr. Kirberger owned the entire stock. I said he owned the entire stock, he so stated to me, of the Kake Trading & Packing Company.

Q. But you knew all the time the Kake Trading & Packing Company was a corporation, didn't you?

A. I don't know that I knew it was a corporation, I think I did. I think it was a corporation.

Q. You had received the deeds and bill of sale, and the deed which you wouldn't put in evidence here because you said you hadn't recorded it?

A. At what time?

Q. Dated February 29, 1912?

A. Yes, that is the original deeds from the Kake Trading & Packing Company to the Kake Packing Company were in Mr. Kirberger's possession and that is the reason they were not recorded. We didn't get them until we were hunting up—in fact I don't know that we had them until my accountant dug them up the other day.

Q. You received the letters though. You admitted in evidence you received many letters written on the letter head of the Kake Trading & Packing Company, with the word "Incorporated" underneath?

A. Yes, sir.

Q. You wouldn't want to say at this time that you didn't know the Kake Trading & Packing Company was a corporation, would you?

A. I don't think it ever entered my head; I don't think I ever thought of it.

Q. You wouldn't want to say you didn't know it, would you?

A. I have answered the question as near as I could.

Q. Whenever you signed papers you were careful to have them signed Kake Trading & Packing Company, were you not?

A. How do you mean?

Q. You had Mr. Kirberger sign Kake Trading & Packing Company?

A. I had him sign both ways, to make sure of it.

Q. You had him sign for the corporation?

A. Simply because the two were interwoven; I wanted to make sure our paper was correct, that he was covering in both instances, whether owned by the Kake Trading & Packing Company—if it is a corporation; I suppose it is. I think we have admitted that—

Q. Yes, you admit it now?

A. Or Mr. Ernest Kirberger.

Q. You wanted to make sure about it because you were not quite positive whether it was Ernest Kirberger or whether it was the Kake Trading & Packing Company, so to cover both you put both on it. Is that it?

A. Yes, sir.

Q. Certainly it is. Did you get from the Kake Packing Company—I notice on this statement in evi-

dence, on which you claim you based the purchase of the assets of the Kake Packing Company, has a list there of "Cashable," \$15,656.37; did the Sanborn Cutting Company get those cashable items reduced to cash?

A. No, sir.

Q. How much did they get cash out of that?

A. Let me take it. I think we can show, by our books, just exactly how much we got out of it.

MR. FULTON: Do you want to know what the books show?

A. I don't think we can show that; that is how much was lost on them; two years' work; there was a loss on it. There was some salmon that I gave to the Fish Commissioner for feeding small salmon at Bonneville, some of the spoiled. We didn't sell it, you know. The lumber, I suppose, most of that was used at the Kake plant; whether it was over inventoried or correct, I couldn't tell you. This is the inventory as the Kake books called for. Accounts Receivable, I don't think we ever received anything on \$410.50.

Q. Accounts Receivable in Alaska are not worth much, are they?

A. No, we don't consider them worth anything.

Q. That is the point I wanted to make. What I am asking about is simply I just want to know how much cash, out of this amount, you folks got, the Sanborn Cutting Company got.

A. Very little. Wait a minute until I explain. Accounts Receivable, I don't think have anything; may have had fifteen or twenty dollars, I don't know how

much; if we got that we are in luck. The lumber I think has been used at the plant. There may be some there yet.

Q. That saved you buying other lumber. You built some new buildings, the Sanborn Cutting Company?

A. Maybe used it; maybe on hand yet, I don't know. The inventory will show how much we have bought, sold, and we have used some, so I don't know. Tierces, we still have some empty tierces; most of them are still there. Lacquer of course has been used.

Q. In the cannery.

A. Stock and what has been used.

Q. By the Sanborn Cutting Company.

A. The tierces of pickled salmon, as I say, some of it was carried over into this year and spoiled, that is some of their tallis did.

Q. Carried it too long?

A. Well, we couldn't get any sale for it. Pickle business has not been in first class shape on account of the war, and we had to carry it as cheap salmon.

A. On account of the war, and it is cheap salmon; it was improperly put up. 6074 cases cans. These were used in 1914 and '15. I guess they were used the first year, 1914. They were used.

Q. That was just the same to you as cash. You would have had to buy cans from the American Can Company?

A. Unless the inventory was high. I couldn't tell you whether high, or what it was without conferring with the books.

Q. Let me ask this: Was there any great diminution in the cost of cans?

A. There was quite a difference between 1913 and '14. That is my remembrance; something like \$1.50 or \$2.00 per thousand, I think was the reduction in price on cans. And shooks went down, box shooks, that includes the shooks—went down from 12½ cents to 9; we are paying nine today. 432 cases of salmon has been sold.

Q. When did these prices go down, Mr. Sanborn, did you say?

A. A 1914—'15.

Q. Between 1914 and '15?

A. 1914; during the season of 1914.

Q. Before the close of the fishing season that year, you mean?

A. Yes.

Q. Simply I want to understand.

A. Groceries in store I suppose is proper. I don't know. Labels, most of them been used; gasoline and tanks, we turned in the tanks.

Q. Turned to the Standard Oil Company?

A. In payment of Standard Oil Company's bill, at two hundred odd dollars, so that was the same as cash. Do you want me to go over the balance of this valuation on plant?

Q. Well, are you using these in your business, or did you use them?

A. Yes, that is this plant, these buildings and machinery.

Q. Certainly the plant that has been used by the Sanborn Cutting Company for years, and you realized something out of these assets. Would you say \$10,000 altogether out of the fifteen thousand? Would you say ten thousand actual cash?

A. I don't think so.

Q. Would you say eight thousand?

A. I don't know. I won't testify to that because I don't know. We can ascertain that from the books, just exactly what we did get out of it if you want to know.

Q. I would like to know that very much if it won't cause too much trouble.

A. It will cause some trouble to go over the books for a season and find out how much we got out of that stuff. It can be done.

Q. Now, the meeting that was called on May 11, 1914, Mr. Sanborn, had been in contemplation for some days; in fact notice, according to the records of your book here, was sent out April 10th of the calling of that meeting of the Kake Packing Company directors?

A. Yes, sir.

Q. Now, you understood at that time, I presume, or it was the understanding between the parties that the Kake Packing Company would go out of business on the consummation of the turning of its assets over to the Sanborn Cutting Company?

A. No, sir.

Q. You expect that on that day, the Kake Packing Company would continue to operate?

A. That meeting was called—do you want me to state what it was called for?

Q. Well, no.

A. That is the question you asked, isn't it?

Q. That isn't the question I am trying to get at.

A. If you will ask the question that way, I will answer it just exactly the way it was.

Q. Well, go ahead and state that.

A. The meeting was called so if Kirberger succeeded in making his deal in the east, the incorporation was to be raised to \$150,000—I think it states in there, doesn't it. Let me see the book of minutes, please; that was on his account; on the other hand, if he didn't succeed, Mr. Kendall and I were to take the plant on our proposition. It was called for both ways; could increase the capital stock to \$150,000. That was by request, if I remember right, of Mr. Kirberger.

Q. In either event, Mr. Sanborn, didn't you know that the Kake Packing Company didn't expect to operate after it conveyed all its plant and the entire assets away on that day?

A. What do you mean? If Mr. Kirberger took it, it was still to operate as the Kake Packing Company; if we took it, it was to operate—we were to operate it, Mr. Kendall and I, at this date.

Q. May 11th?

A. No, April.

Q. April 10th. But I mean at the period between April 10th and May 11th; you knew before the exact date of May 11th, that Mr. Kirberger wasn't able to raise the money, didn't you?

A. Sure.

Q. And you knew that the Kake Packing Company was going out of business on that date when it conveyed its assets over to the Sanborn Cutting Company?

A. We knew when we purchased the plant and all the transfers made that they were going out of business as the Kake Packing Company but I have just said that when this meeting was called it was called for either purpose; either Mr. Kirberger was to take the plant and increase the capital stock to \$150,000, and the plant was to continue, or he was to get other people interested in the plant and continue the Kake Packing Company.

Q. Increase the capital stock to \$150,000, and you gentlemen would all retain your stock in it.

A. No, I don't think so; I don't think our stock was to be retained.

Q. You were going to get out of it?

A. You bet you. Our contract showed that. We agreed to let him turn over the whole business, all of our stock, not only Mr. Kendall and myself, but Mr. Fulton, Mr. Gordon and Mr. Frank H. Sanborn. The contract made in March shows that.

Q. Now, I understand you, Mr. Sanborn, that all the payments you have made—you don't contend in any way that a single dollar of that was paid directly to the Kake Packing Company. Simply contend, or you say that the Sanborn Cutting Company with its checks, or with its cash, or as I understand it, with some cash of yourself and your son in your copartnership business, which I assume it is, paid the liabilities of the Kake Packing Company.

A. Why, most assuredly I contend it was paid the Kake Packing Company. The minute we paid their liabilities, money they owed, we paid it to them. No question about that in my mind.

Q. Did you ever make any entry on your books?

A. Kake Packing Company, yes, they are right here.

Q. Simply transferred entries?

A. No, as we—on the date the transfer was made I notified the creditors of the Kake Packing Company that we, Sanborn Cutting Company, would pay the accounts, and they all accepted; in fact, they were very much pleased to know that they would.

Q. You didn't send any notice to the Kake Trading & Packing Company?

A. We didn't owe the Kake Trading & Packing Company anything.

Q. Didn't owe them anything?

A. Not a cent.

Q. Never paid the \$1750 for land, did you?

A. We didn't owe that.

Q. Why is that?

A. Why if anybody owes it, the Kake Packing Company owes it.

Q. But the Sanborn Cutting Company got the land—

A. The Sanborn Cutting Company bought the Kake plant on the list of liabilities, which we have paid.

Q. Did you assist in making up the list of liabilities?

A. I don't think I did. The list of liabilities was made up by Mr. Snell and Mr. Kirberger.

Q. Mr. Kendall introduced the resolution, didn't he?

A. Undoubtedly would introduce it.

Q. You don't mean to say that you and Mr. Kendall with all your experience as business men, didn't know what the list was before you accepted it, do you?

A. I have already testified I don't think I ever looked into the Kake books until after the deal was made with Sanborn Cutting Company.

Q. You mean—

A. I mean I left that to my accountants. We are running three or four or five plants, and I haven't time to keep books.

Q. Isn't it true, Mr. Sanborn, that you and Mr. Kendall as a matter of fact, had written various creditors, taken up with various creditors—I don't know whether written them or had seen them personally, or just how you had done it—but anyhow you had communicated with various creditors of the Kake Packing Company a month prior, at least a month prior to this meeting of May 11th, stating the Sanborn Cutting Company was going to pay the liabilities of the Kake Packing Company?

A. No, no, but I tell you what we did do in January. On the 6th day of January, when that other contract was made, I wrote to the creditors and said we would be responsible for the debts of the Kake Packing Company, notified them all, I think, including those in Alaska.

Q. The ten thousand dollars?

A. Got the whole thing with the exception of those we were in, already endorsed on. In that case we just merely said the Kake Packing Company was out of business, or would be out of business and we would see that payments were made.

Q. You said that the Kake Packing Company would be out of business?

A. Yes, as far as we were concerned.

Q. And the ten thousand dollars, which I think to make it exact is \$10,956.96, that is the sum you wrote to and said that you would be responsible for?

A. No, I said in addition to that, that \$67,000. Bring the list here. For instance, the American Can Company, my remembrance is we gave them notes covering that. I think we gave the American Can Company notes covering that ten thousand, if my remembrance is right. We either wrote them we would pay it or gave them notes anyway. I think eventually notes were given for the payment of that \$10,504.

Q. And you and Mr. Kendall wrote and told them that either you two gentlemen personally would be responsible, or the Sanborn Cutting Company?

A. George W. Sanborn is the one that wrote this; George W. Sanborn & Son would be responsible, and pay the debts. I think we can find some of those letters too, if you want them. You asked about this—I don't know whether I finished this Sanborn Cutting Company.

MR. FULTON: He wanted to know whether credited on the books of the Kake Packing Company.

A. Here it is, right here.

Q. No, that isn't what I asked at all.

A. That is what he asked me.

Q. No, I didn't.

Q. The points I wanted to know is this: Is there an entry on your books, the Kake Packing Company books, any place, showing the receipt of one dollar, or any sum whatever, for this transaction? Now, cash or check, or anything representing money, outside just the assumption of the liabilities of the Kake Packing Company?

A. Why, the accounts themselves show the money; when we paid the accounts, it shows.

COURT: What counsel wants to know is whether there is anything on the books to show that the Sanborn Cutting Company paid to the Kake Packing Company any money.

A. On the Kake books?

COURT: Yes.

A. The only items shown on the Kake Packing Company books are transfers made on May 11th when Sanborn Cutting Company assumed—who were solvent and able to pay.

COURT: All the accounts were transferred on that date?

A. The accounts were transferred on that date; the different accounts that they owed were charged with the amount and Sanborn Cutting Company credited on the books, so the Sanborn Cutting Company account, when it was through, would show that the liabilities were paid; the books so show it here.

Q. As Sanborn Cutting Company or else George W. Sanborn & Son.

A. George W. Sanborn & Son is only in here through this—as agent of the Sanborn Cutting Company. We are the agents of the Sanborn Cutting Company, the same as we were for the Kake Packing Company, and in some instance, some of the bills have been paid through George W. Sanborn & Son for account of the Sanborn Cutting Company.

Q. And the Sanborn Cutting Company paid these liabilities with its checks, or its cash. Is that correct?

A. Yes, sir.

Q. And it took the matter of payment up with the creditors themselves. I mean the Sanborn Cutting Company or you and your son, as agents for it, took up the payment?

A. In writing one of the creditors of the Packing Company, we would say—"Enclosed herewith find check" in a certain amount.

Q. Of Sanborn Cutting Company?

A. In payment of Kake Packing Company account. Our checks would state—our checks themselves were put in evidence here and so state.

Q. Checks of the Sanborn Cutting Company?

A. Yes, checks of the Sanborn Cutting Company.

Q. Certainly.

Q. Mr. Sanborn, over Sunday, did you look up and see whether or not you received that letter of March 18, 1915, from Mr. Kirberger?

A. We looked it up Saturday and looked it up again this morning, and I can't find any letter of that kind in our files.

Q. You find nothing of that kind?

A. No, sir.

Q. You don't wish, however, to state positively you didn't?

A. I wouldn't be positive whether I received it or not. I don't want to say I didn't, and I am not positive. We haven't it in our files, anyway. I just looked through the files myself.

Q. Now, I understood that on the Kake Packing Company there is a charge back of \$1750, a debt against the Kake Trading & Packing Company. Is that right?

A. That is on the Kake Packing Company books?

Q. Yes.

A. The books themselves show for that; they are here.

Q. Now, what reason—the reason of that fact, as I understand, is the Kake Trading Company received nothing for this land from the Kake Packing Company. Is that right?

A. I believe that is correct; if the entry is there and I think the entry is there.

Q. And that is the way the matter stands at the present time, is it not?

A. As far as the Kake Packing Company is concerned, I believe it stands that way on the books.

Q. And the Sanborn Cutting Company, of course, never paid the Kake Trading & Packing Company the \$1750?

A. No, sir.

Q. Now, the two instruments or conveyances made under date of May 11, 1914, one was a deed made out

by Mr. Kirberger, by the Kake Trading & Packing Company, and by the Kake Packing Company to the Sanborn Cutting Company?

A. I think the deed is signed by Mr. Kirberger. The deed is on record there; the Kake Trading & Packing Company.

Q. I am not trying to state anything that is not true.

A. I think signed by all parties.

Q. There is the paper there. You notice signed by Kirberger, personally, by the Kake Trading & Packing Company, and the Kake Packing Company?

A. Signed by Kirberger personally; Kake Trading & Packing Company, by Ernest Kirberger, President; Kake Packing Company by Ernest Kirberger, President, and Kake Packing Company by George W. Sanborn, Secretary. Signed by all parties.

Q. That is what I meant. And the bill of sale of the same date is simply made by Kake Packing Company to Sanborn Cutting Company?

A. That is made by Kake Packing Company per Ernest Kirberger.

Q. And yourself?

A. And myself.

Q. Now, these two instruments, as I understand it, Mr. Sanborn, were part of the same transaction, both in relation to the turning over of the entire assets of the Kake Packing Company to the Sanborn Cutting Company?

A. That was the meeting of May 11th?

Q. Yes, on May 11, 1914?

A. Yes, sir.

Q. There was no other consideration for either one of these papers? except the assumption of the debts as set forth by you in your pleadings here, that was the seventy-two thousand some odd dollars, and which you claim you have actually paid eighty-one thousand some odd dollars on?

A. There was a list of liabilities, that is made a part of this, from the Kake Trading & Packing Company, to the Sanborn Cutting Company.

Q. From the Kake Packing Company, you mean?

A. From the Kake Packing Company, which the Sanborn Cutting Company agreed to pay and did pay.

Q. And that was the entire consideration for either of these two conveyances.

A. That was the entire consideration, yes, sir. Well, there was, I think, a receipt in full taken from Ernest Kirberger—let's see; it seems to me there was something of that kind. Let me see that a minute—that bill of sale. These speak for themselves anyway.

Q. Now, relative to these payments, Mr. Sanborn: As I understand it, there is a great many extraneous matters in these; for instance, here are some checks; one is check in favor of Ben F. Hosking & Brother, check of yourself and son, George W. Sanborn & Son, for \$1.25, dated April 25, 1914. Now, that was paid, as a matter of fact, long before the transaction?

A. You will have to let me look at it; I can't testify that. This shows what it was for; 10 cask pickled fish, icing charge.

Q. That was paid before May 11, 1914?

A. Yes, sir.

Q. Some two weeks?

A. Paid in April.

Q. Here is check for \$22.00 to the Ice Delivery Company, dated May 12th.

A. That is May 12th.

Q. \$22.00; is that for the Kake Packing Company?

A. Why it was; some of the liabilities of the Kake Packing Company, the same as this was; this icing charge on pickled fish shipped to Chicago—shipped to Hosking, Chicago.

Q. Paid by Sanborn & Son with their check on the same date as the conveyance was made? May 12, 1914.

A. I think the conveyance was May 11th; it doesn't matter, however, which it was. I am not sure whether conveyance May 11th or May 12th.

Q. May 12th.

A. May 12th, on the same day then.

Q. Here is one to C. B. Hueitt?

A. Yes, Charleston, South Carolina.

Q. Check for \$197.05, dated March 24, 1914, drawn by Sanborn & Son.

A. Here is the voucher attached, shows what it is; evidently allowance made C. B. Hueitt on salmon shipped.

Q. Whose salmon?

A. Kake Packing Company salmon at that time.

Q. That was a date prior—almost two months prior to the conveyance?

A. Yes. There are some checks and items that don't belong in; I have looked to see if this is one of the items that I testified to there. You will have to give me both lists. As I said on Saturday, there are some items that don't belong on the Kake Packing Company account, among these vouchers.

Q. That is what I was trying to find out.

Q. Out of that is item of \$18.55 that belongs to the Kake Packing Company and \$178.50 belonging to Sanborn Cram Company, of this amount of \$197.05. Your voucher here tells you the amount that is charged.

Q. \$18.55 of that amount was paid on account of the Kake Packing Company.

A. Kake Packing Company.

Q. Almost two months prior to the conveyance?

A. All these items—if you will hand me that statement I can show you all those items are additional items that we paid over and above the original liabilities—that is the original liability statement.

MR. FULTON: Original \$72,000?

A. Original \$72,000. These are in excess of the \$72,000; they show in the George W. Sanborn & Son account here.

Q. Now this check for \$25.00 for Western Union Telegraph Company, dated March 27, 1914, I take it from your voucher that \$1.80 of that was for account of Kake Packing Company?

A. On account of Kake Packing Company.

Q. Paid some two months before?

A. Yes, sir.

Q. The date of the conveyance?

A. That is an additional charge, additional payment outside of the \$72,000.

Q. Here is a check, April 8, 1914, Oregon-Washington Railway & Navigation Company, \$146.13, check of Sanborn & Son.

A. That is an additional payment outside of the \$72,000.

Q. For the Kake Packing Company?

A. Account of the Kake Packing Company, voucher 1533.

Q. About a month and three days prior to the conveyance.

A. Yes, this is additional, outside. As I said, outside of the seventy-two thousand, and here is the voucher; it is a shipment or freight on ten casks; that is that same ten casks of pickled fish that you showed another charge for icing charge; shipment of ten casks pickled fish to Chicago, \$146.13. I would state here that these are sundry charges; in my statement it shows exactly what they are, all these items; sundry charge against inventory; that is the Kake Packing Company, inventoried to George W. Sanborn & Sons between the taking of the inventory and the sale to Sanborn Cutting Company on May 11th. The total amount of those extra charges that you are showing there are \$596.92.

Q. And they were—this \$596.92 were all paid, as you state on this statement?

A. There is the statement; explains it right there.

Q. Defendants' Exhibit "M," prior to the conveyance, and paid by checks of Sanborn & Son, and carried

on the books of Sanborn & Son at that time; is that correct—prior to the conveyance?

A. It is carried in account of George W. Sanborn & Son against the Kake Packing Company.

MR. FULTON: We have the ledger here, showing that.

Q. You don't contend, Mr. Sanborn, that there is any interest in these items included in the \$596.92? Did you pay any interest on any of these accounts?

A. How do you mean?

Q. You don't contend you have paid any interest on any of these up to May 11, 1914?

A. Why, there was interest due George W. Sanborn & Son on these accounts, most assuredly.

Q. How much interest?

A. We charge interest—when we have an account we charge interest against that account for any advances we make.

Q. How much did you charge on that account, that \$596?

A. I can't give that offhand without referring to the books. I don't know that we charged anything; you asked the question whether or not we do charge interest. I say, yes, we do charge interest, and it is an oversight, if we haven't done it.

Q. You misunderstood my question, Mr. Sanborn. As a matter of fact, I asked you whether or not these amounts included any interest.

A. It shows right here.

Q. Now, since you say Sanborn Cutting Company charge interest on an account, I would like to know—

A. I didn't say Sanborn Cutting Company; I said Sanborn & Son.

Q. I would like to know how much interest Sanborn & Son charged against that to the Kake Packing Company.

A. I can't tell that without referring to our books; I don't know that they charged anything on that.

Q. Now, that \$592.96—

A. I would say right here that there is an interest account charged by George W. Sanborn & Son on open account of the Kake Packing Company from January to May, \$261.20; that is on the average account from January to April, latter part of April, \$261.20. I would say that there was interest charged on that account—on this payment rather.

Q. That does not—that amount is not included within the three hundred twenty-six and some odd dollars in favor of Sanborn & Son, is it?

A. The amount of May 11th of Sanborn & Son, when the transfer was made was \$31,010.88; that had some credits for stock sold; that is their inventory and charges for payments that we had made, which changed the account from the original liability statement of January 6th to the statement rendered—

Q. And that includes the sundry items?

A. (Continuing) To the statement made—

Q. March 21st?

A. March 21st, Yes, sir.

Q. What I want to know—what occurs to me, Mr. Sanborn, is that \$596, or these sundry items; are they included in that item shown on your statement of March 21, 1914?

A. No, sir, these are additional items, afterwards.

Q. But on the books of Sanborn & Company at that time?

A. I was going to say here is a statement showing that entire transaction between January 6 and the date of the transfer to Sanborn Cutting Company, showing the credits and debits to it; of the Kake Packing Company in account with George W. Sanborn & Son, with the exception of that \$20,000—that amount. If you will get the original statement of January 6th—if you will get the statement there of liabilities, of January 6th—it is the March statement I want—this is not the one. There is a duplicate entry right here. Marconi Wireless, \$332.78, deduct that, and that shows this statement, \$31,010.88, same as here; \$20,000 of it was Astoria Savings Bank; that shows the balance here. This statement, if you want that to go in with the balance, shows the transaction right there from that date up to May 11th or 12th, the date of the transfer—shows the credits received from the sale of inventory and debits of the different accounts paid, what they were paid for.

Q. Now, I notice this Seattle Hardware check, dated December 12, 1914, for \$87.50 on Sanborn Cutting Company's form.

A. That is an additional payment made the Seattle Hardware Company. I explained that.

Q. Where is the other check for the remainder of that account?

A. You have it there. If you will let me have the Kake book, I can show you that transaction. That is a lot of winches charged back to the Seattle Hardware

Company, which they refused to accept and held the Sanborn Cutting Company for them. That is, we paid it rather than have any controversy with them, and we had the winches shipped to Astoria; we still have them on hand. I think they are at Kake now; think we shipped them to Kake.

Q. Check for \$9.30, Tongas Trading Company, August 14, 1914, I understood you to say that is an account you found afterwards.

A. That is an account they claimed the Kake Packing Company owed them, and we paid it. I think the correspondence is here.

Q. About three months afterwards?

A. Yes, here is the correspondence on it. Here is the bill. It is a bill they claimed they had delivered the Kake Packing Company in October; September and October, 1913.

Q. The year before?

A. That was the year before the transfer.

Q. Yes.

A. Yes.

Q. For a launch.

A. But this don't appear on the Kake books; this credit don't appear on the Kake books to the Tongas Trading Company.

Q. Sanborn Cutting Company's check for \$3.45 to B. M. Barron's bank was to pay the account of the Petersburg Meat Company for that amount; paid several months afterwards.

A. That is the same thing; that is another bill that was not in the Kake Packing Company books. I think

the correspondence is here, rather the statement showing what it is for. That was in August, 1913. Not credited on the Kake Packing Company's books. I don't know whether any correspondence on that or not. I guess just the statement. Another case of the same kind which they claimed was due from the Kake Packing Company and was not—no credit on the Kake Packing Company's books.

Q. Draft against the Kake Packing Company to B. M. Barron Company, November 30, 1914, the Petersburg Meat Company, to the Barron's Bank. You evidently received notice from the Barron's Bank that draft had been drawn.

A. No, we gave a check.

Q. There is notice of the draft right here.

A. We paid it to the bank. Here is check.

Q. They drew on you and you paid the bank? Drew on Sanborn Cutting Company?

A. I suppose they sent that down through the bank to Mr. Minard. Mr. Minard is Sanborn Cutting Company's representative at Kake.

Q. He is your manager or superintendent?

A. I think he had instructions from us to pay it—from Astoria. We gave Mr. Minard instructions to pay it from Astoria.

Q. Now, this item of check to J. V. Snell, bookkeeper, July 31, 1914, Sanborn Cutting Company's check for \$31.82. That is for petty cash advanced by Mr. Snell, I presume, account the Kake Packing Company. Is that correct?

A. Yes, \$2.82 of it.

Q. \$2.82 of that amount——

A. Was paid Mr. Snell, postal fee on \$921.00 sent the government money order.

Q. Sent to the clerk of the District Court at Juneau?

A. Yes.

Q. Payable on account of Kake Packing Company?

A. 1913 pack of Kake Packing Company. That is in addition to the liability statement.

Q. You knew, as a matter of fact, Mr. Sanborn, that you had to pay a license to the clerk of the District Court, Alaska.

A. We did pay it.

Q. Here is the check here, to Mr. Bell.

A. \$921.04.

Q. Dated July 17, 1914.

A. Yes, sir.

Q. That was for the 1913 pack?

A. States right there what it is for.

Q. At the time you took over the assets of the Kake Packing Company, you knew the tax was due, didn't you?

A. I did not.

Q. You didn't know it?

A. No, sir, I supposed it had been taken care of; should have been taken care of and paid.

Q. Charles McConoughy, check dated December 8, 1914, for \$10.00, Sanborn Cutting Company, signed by your employee, Mr. Minard. This is in those regular accounts, \$10.00 account which you took in on the regular liabilities, is it not?

A. Yes, that is one of the regular accounts.

Q. And that was paid December 8, 1914; you didn't pay Mr. McConoughy any interest on turning his account over at the end of the season?

A. No, sir.

MR. FULTON: You mean did the Sanborn Cutting Company charge McConoughy interest for not paying his indebtedness when it was due. Is that what you mean?

A. That is what I understood him.

MR. FULTON: I would like to pay my debts that way.

Q. You understood it that way, did you?

A. Yes, sir.

Q. You understood I meant you hadn't—

A. You asked me if I paid Mr. McConoughy, or whatever his name is, any interest on that account.

Q. Yes.

A. I said no, we hadn't.

Q. Certainly you didn't pay him. Just paid the personal account.

A. No, paid \$10.00; that is all he asked. I only paid interest on these old accounts when they requested it—insisted on it.

Q. Well, now, how much of this check, of the Sanborn Cutting Company's check, dated December 8, 1914, for \$114.17, how much of that amount is on the Kake Packing Company account?

A. It shows what it is right there, vouchers attached.

Q. What is the amount?

A. There are vouchers right there. That is for June business. This \$10.00 is the only thing; that is the Western, isn't it; that is the \$10.00 item of Western. The balance is for 1914 business against the Sanborn Cutting Company.

Q. This \$10.00 you paid on Kake Trading & Packing Company account is hotel bill of one of the employees of the Kake Packing Company.

A. I don't know what it is for; it is in the liability statement of the Kake Packing Company, the old liability statement. Hotel Wester.

Q. You didn't pay interest on that account?

A. Shows there if I did. The balance is new business, Sanborn Cutting Company business for 1914.

Q. Now, this check in favor of the Standard Oil Company for \$400.00, signed by Sanborn Cutting Company, that was made out practically a month prior to the date of the conveyance, was it not—April 14?

A. That was paid on account of the oil account.

Q. Paid on account of the oil account?

A. I think so; let's see. April 14, 1914, \$400.00; yes, sir. Here it is right here. There is a letter, copy of a letter.

Q. And that is the copy of the letter that you wrote, or the Sanborn Cutting Company wrote?

A. That is copy of letter right there attached.

Q. Was that an extra, or what you call an additional item on the liabilities?

A. Let me see it.

Q. That was something that had already been paid by you, and——

A. No, sir.

Q. That wasn't included, was it?

A. No, sir; that is the same liability. There is \$400.00—\$115.37 and allowance on three empty drums returned.

Q. No interest in that, at this time, I mean as far as the \$400.00 is concerned, is there?

A. Where is the original statement there? Where is your March statement? I can tell. There was no interest paid the Standard Oil Company. \$779.37. The account was the same.

Q. Now, this First National Bank; this note, \$3428 payable to the First National Bank of Portland, signed by Sanborn & Son. That was paid on April 24, 1914, according to the stamp, was it?

MR. FULTON: All those bills show the date they were paid; taking up a whole lot of time on proving dates of delivery of checks where the checks are dated; date of its issue, and the date of its payment is stamped on its face.

A. This is the—this has nothing to do with this voucher. This has something to do with the voucher, but is not the payment; this doesn't call for \$3400; this is error of \$3400 that was made in the Kake Packing Company books that I testified to yesterday, or Saturday. That is the error; that is charging it back. That was a rejected car of salmon, and in place of charging on the Kake books to bills payable, they charged it back to salmon account—canned salmon account, and showed a difference of \$3428.11 in the Kake Packing Company books. Made an error of that amount which we paid

afterwards. That is one of the extra payments made, but this doesn't refer—the only thing on this vouched in cash paid for is \$1.84 and 75c.

Q. Total \$2.59.

A. Yes. Those two items refer to telegram, probably the exchange. Exchange on a draft on O. R. Pieper; exchange on draft A. Grossenbeck. The only charge to the Kake Packing Company in that voucher is \$2.59.

Q. That is an additional amount, as I understand it?

A. Wait a minute. I am not going to say it is an additional amount until I look it up. That is an additional amount; exchange on old salmon drafts. There is \$2.31 there paid; that is another voucher. There is the two items there. Another voucher goes with this, No. 1532, \$2.31. Those are additional outside of the statement of the Kake Packing Company, of the liability statement. That is outside of this statement entirely.

Q. Something that occurred on April 13, 1914, barely a month prior to the conveyance. A. V. Snell, \$118.87; that was one of the regular amounts?

A. \$118.87; that was on the liability statement.

Q. And that doesn't include any interest?

A. No, sir, that is the Kake bookkeeper, pay for labor.

Q. Now, this check to F. N. Kendall, \$115.53, on Sanborn Cutting Company's checks?

A. That is the original statement; that was for labor.

Q. Is that amount on the original statement?

A. Same amount, \$115.53.

Q. Paid October 14, 1914?

A. The date of the check will show payment.

Q. George E. James, check Sanborn & Son, May 29, 1914, \$380.15. That is one of the regular amounts?

A. That was evidently a balance; we had \$500 previous to that. You will find another voucher there; here is another check for \$500 right here; \$500 paid on April 14; \$500; and May 29, \$380.15.

Q. \$500 was paid, according to the voucher, April 14, 1914?

A. April 14, 1914.

Q. Practically a month prior to the sale, and can you tell whether or not—would that be one of the accounts you charged interest on?

A. Why I imagine so, if we paid it.

Q. That would be including the interest charge?

A. Be included in George W. Sanborn & Son's interest charge.

Q. Against the Kake Packing Company. Fisher Brothers, Seattle, \$712.60, check April 14, 1914. That was George W. Sanborn & Son.

A. How much?

Q. \$712.60.

A. Fisher Brothers original account was \$667.80; the balance is interest on that charge, making \$712.60; the original account was \$667.80; that is the amount we paid them.

Q. And interest then is——

A. Is their charge for interest on open account from the fall until the date it was paid, April 13th.

Q. How much is the original account?

A. \$667.80.

Q. And the difference between those two amounts, that interest, is an additional amount?

A. Charged by Fisher Brothers.

Q. And paid by you practically a month prior to the date of the conveyance?

A. Yes, sir.

Q. And carried on your books?

A. Carried on my books.

Q. Sanborn & Son's?

A. Yes, sir.

Q. Practically a month prior to the date of the conveyance. I don't know what that is.

A. Let me see it and I can explain it. This one voucher, that wasn't carried on Sanborn—yes it was too; that shows the cannery voucher, \$712.60.

Q. Now this check for F. A. Coles, favor of Fred A. Coles, calls for \$800.22, by Sanborn Cutting Company, dated November 7, 1914; I understood that was the original amount less a credit on account of a debit, which was on account of fish, or something of that kind.

A. Here is the statement of the account right here; this is both the 1913 and 1914. There is a balance on the old account of \$552.07, and you will find another voucher in there besides this and there is \$248.15, which is 1914 account. That is Sanborn Cutting Company's account; this is the old balance \$552.07. There will be another voucher there of Mr. Coles. Wait a minute and I can tell the amount. There are two more vouchers, one for a hundred, one for fifty; voucher 1478 and voucher 1539. They were all pinned together then; they are together now.

Q. They must be together now, for I brought the whole batch.

A. They are; you didn't look far enough. One for fifty; one of a hundred, making the total payment to Coles, \$702.07. The original credit to Coles on the Kake Packing Company books was \$808.42; the difference is fish which he caught while receiving salary from the Kake Packing Company; \$808.42 original credit on the Kake books.

Q. \$100.00 of that amount was paid by George W. Sanborn & Son on March 24, 1904?

A. Yes.

Q. And \$50.00 paid on April 10th?

A. 1914.

Q. And carried on the books of Sanborn & Son at the time of the conveyance?

A. Yes, sir.

Q. And the balance, the sum of \$552.07, was not paid until the following fall, November 7, 1914?

A. Date of check there; date of voucher.

Q. Now, this check of \$1400 of Sanborn Cutting Company, dated April 14, 1914, that is the account of freight, to the Pacific Coast Steamship Company, is it?

A. Yes, sir.

Q. Is that an additional amount?

A. The original amount of the Pacific Coast Steamship Company was \$1419.67. You will find four vouchers there; one for \$1400; one for \$19.67, and an additional amount of \$1.10 and \$12.40, making total payments to the Pacific Coast Steamship Company of \$1433.17.

Q. That was paid by Sanborn Cutting Company check on the date you state?

A. Yes, sir.

Q. April 14, 1914, and you accompanied it with a letter to Mr. Floyd. Agent Pacific Coast Steamship Company in Seattle, "We enclose you herewith our check in the sum of \$1400 on account of Kake Packing Company. Just as soon as we can get straightened up on storage bills, we will send you check to cover balance"?

A. Yes, sir.

Q. Signed by some representative of the Sanborn Cutting Company?

A. Presume it was signed by me.

Q. And then on August 15, 1914, you sent Mr. Floyd, as agent of the Pacific Coast Steamship Company, check for \$1.10.

A. That is additional charge.

Q. That was also Sanborn Cutting Company check?

A. Yes, sir.

Q. Additional charge?

A. There is another one there of \$19.67 and another for \$12.40. There is your \$12.40.

Q. Dated April——

A. That is an additional charge.

Q. February 15, 1915?

A. Yes, sir.

Q. Sanborn Cutting Company.

A. Here is letter that explains difference in settlement of 1913 over charges.

Q. Some dispute about this settlement which had not been made up to that time?

A. They wanted more than the Kake credit. The Kake credit was \$1419.67, and they claimed \$1433.17, which we paid.

Q. You don't mean that the Kake Packing Company tried to conceal that from you and Mr. Kendall in any way, did you?

A. I don't say anything about it. I merely stated the books show \$1419.67. I suppose it was an error to credit.

Q. Certainly. Now, this check to Seattle Astoria Iron Works, \$26.03, dated November 30, 1914, Sanborn Cutting Company check.

A. You will have to take these all together.

Q. That is the first one I think you will find.

A. No, I think this is the first one. The Astoria Iron Works, it is shown here in the liability—Astoria Iron Works; it was originally the Astoria Iron Works and afterwards moved to Seattle. The original credit on the Kake books is \$1228.15. The balance of the charge is for interest with the exception of—is that the interest—I think that was interest paid; the payment we made them—the total payment we made then was \$1327.86; the difference between the two items was almost entirely if not entirely interest. I don't think was any charge on the credit with the exception of the interest. The interest charge shows here on the statement. That payment was made in two checks, one for \$1301.83; the other for \$26.03.

Q. What terms did the Astoria Iron Works give on that, I mean in the sense of interest terms?

A. The statement shows for itself. I haven't figured it; I couldn't tell you. They charged up interest there monthly; you will have to figure.

Q. That has been figured right up to that date, has it?

A. This is the amount we paid them.

Q. May 11th.

A. This is the amount they asked for or demanded and we paid that amount.

Q. Is that the interest to May 11th, or have you included in that interest past that date, is what I want to get at?

A. I testified here no interest charges were made after transfer—any interest charges—we merely charged interest—paid interest up to May 11th and not beyond that.

MR. FULTON: All these bills you speak of charged interest up to May 11th, not beyond that?

A. That is my remembrance.

Q. Now, this check for \$7500 in favor of the American Can Company, was the Sanborn Cutting Company, dated April 14, 1914, wasn't it?

A. Yes, that is the check of the Sanborn Cutting Company, payable to American Can Company, \$7500. Then there is——

Q. You make interest in favor of Sanborn & Son regardless of whether Sanborn Cutting Company paid it?

A. No, sir, we didn't.

Q. Did the Sanborn Cutting Company charge interest to itself?

A. That I couldn't say. I don't think any charge; there was no interest charge of Sanborn Cutting Company on May account. There was payment on May 29, 1914, that is after transfer made, George W. Sanborn & Son \$3529. Here is the charge here; there is George W. Sanborn & Son voucher and their check. Then there was \$100 we gave in settlement in shipping the machinery, the can-making machinery back—it was part of the assets of the Kake Packing Company—back to the American Can Company, and had our notes, that is the Kake Packing Company note, canceled. That is the \$100.00.

Q. Would it take \$100.00 off—sending that machinery back took \$100.00 off the outlay of money. You didn't have to meet that \$100.00 note, I mean.

A. We sold—we practically sold \$2800 worth of assets for the releasing of the note is what we did; that reduced our assets; that is the Kake assets turned over to us we turned into the American Can Company in cancellation of the note.

Q. Was it a conditional bill of sale on it when you bought it?

A. No, was rental machinery.

Q. The machine was rented?

A. Yes, rented machinery.

Q. Well, it wasn't assets of the Kake Packing Company, was it?

A. Most assuredly it was. We gave note for payment of the rental; Kake Packing Company gave note for payment of the rental. Rental of all American Can Company machinery is payable in advance, but in place of paying cash, they gave the note.

Q. And who does the machine belong to?

A. American Can Company; we didn't use them; we returned them.

Q. The machines were not the property of the Kake Packing Company, were they?

A. As far as rental was concerned, yes, and part of their assets; in their assets and liabilities statement here.

Q. Lease.

A. Lease can machine machines, right in their assets statement here; there are two items here, \$2937.63, and \$2947.39. The balance of the machines we still have; that is the amount that was returned. These entire assets here, shown on their statement, \$76,300.65.

Q. Now, look at this check for \$192.08 drawn by Sanborn & Son in favor of the American Can Company, that interest is computed up to May 13, 1914, isn't it?

A. I don't know; you will have to figure it to find out whether that was computed up to that date or not.

Q. You wouldn't say it wasn't?

A. I just said I didn't know; you will have to figure it. It is right there; it speaks for itself.

Q. Sundry payments voucher; what you call sundry payments. Is that anything different? I mean does that show different amounts or is that again the voucher covering several of these things you have already gone over?

A. I don't know; the bills are attached to it.

Q. I just want to get it clear in the record, Mr. Sanborn, that this voucher entitled sundry payments, that these items were all set forth on other vouchers that are in evidence.

A. I think these vouchers are all in there—are already in.

A. That is a voucher from George W. Sanborn & Son.

Q. In account with Sanborn Cutting Company.

A. Yes, in account with Sanborn Cutting Company. We can check them over; I can check them for you in a minute.

Q. Now, this check of June 20, 1914, George W. Sanborn & Son to yourself, counter check of Astoria Savings Bank, \$1633.34.

A. Yes, \$350.00 is the Kake part of it.

Q. \$350.00 of that is interest on note.

A. Up to what date?

Q. Computed to what date, do you know.

A. There is \$350.00 interest paid there, and \$186.67 applied up to May 11th—of that \$350,000.

Q. Of that \$350.00, \$186.67—

A. Applied up to May 11th. The balance was applied after May 11th—of the 350.00.

Q. Now, this check in favor of S. S. Gordon, \$525, Sanborn Cutting Company, dated January 29, 1915, what is that?

A. \$113.99 of that applies up to May 11th.

Q. \$113.99 of that applies to May 11, 1914?

A. Yes.

Q. And that is interest on the notes as I understand, that you say the First National Bank first loaned the company \$5000 and Mr. Gordon took up these notes, and the Kake Packing Company gave Mr. Gordon a note instead?

A. These two notes that were taken up by the Sanborn Cutting Company, with interest, were taken up of that date, according to this, and that was interest due up to May 11, 1914, was charged to old Kake Packing Company account—Kake Packing Company notes; the balance interest, was charged off to our regular account.

Q. Than that amount of interest——

A. Is to May 11, 1914.

Q. \$186——

A. On that one \$186.67.

Q. And it was not paid by the Sanborn Cutting Company until the 29th day of January, this year?

A. That was paid by taking up two notes of the Sanborn Cutting Company that I testified to Saturday; I think he still has some of those notes—are not due. We took the notes up and turned them in here.

Q. But the interest account was not paid until January 29th; it was in this same check of \$525?

A. They were paid when transfer was made of the two notes. There is the memorandum right there.

Q. Well, isn't that dated January 29, 1916?

A. That is what I say; that is the date of the transfer of the two notes and the date—interest is charged up on these notes, to May 11th only.

Q. Now, these two checks here in favor of S. S. Gordon, each dated July 15, 1914, and each for \$1379.52—one may be a void one that you destroyed or something after.

A. One is.

Q. The signature apparently is destroyed; seems to be a duplicate.

A. There is only one check there. You see this check is destroyed. Merely attached to voucher to show they made a mistake in stamp on here. In place of stamping \$1379, they stamped 3793, and they drew a new check and canceled the old one. Only one check, \$1379.52.

Q. Paid June 14th, 1914, Sanborn & Son.

A. That is the date, yes. That is the date one of the notes was due; July 15, it was paid.

Q. Do you contend there was any additional payment in that amount of money?

A. How do you mean additional payment?

Q. Above?

A. The original \$1250?

Q. Yes.

A. Sure; there is interest up to May 11th.

Q. How much is that interest up to May 11th? Can you say?

A. Well, it will show on the list here; \$113.99 applied there of that \$129.00.

Q. And that note is the note of January 22, 1913?

A. That note is in the records here.

Q. Now this Sanborn Cutting Company S. S. Gordon voucher——

A. That is \$114 of that.

Q. \$114 of that is interest on one of these notes of Gordon? And this amount was paid on July 15, 1915?

A. Yes, the date of the voucher and check.

Q. Now, here is another one to Gordon with check July 15, 1915, for \$1467.04; when was that paid?

A. Let me have those three together, or those two. You are double banking me on some of these. That is

George W. Sanborn voucher with one attached to it; there are the two vouchers right there; that merely refers to one of these.

Q. This is the one I just was talking about.

A. I know, but that doesn't belong; here are the two your payments show. That is George W. Sanborn voucher, and you have the same voucher right here. Sanborn Cutting Company voucher 4544 is the same as George W. Sanborn voucher A-1833. This refers to that; these two go together; here is the other one; only two of these notes have been paid as I testified to.

Q. Voucher 4544 and 1833.

A. They are the same voucher, only this was paid by George W Sanborn & Son, and here is the Sanborn Cutting Company voucher for it. There are two vouchers there pertaining to the other payment. We better get this one straight. \$1263.99 of the item of \$1379.52 on Sanborn Cutting voucher No. 3158 pertains to payment of the same note as George W. Sanborn & Son voucher No. B1314. That is the amount due from the old Kake Packing Company; that is the amount paid on these two items right there.

Q. Now, this check in favor of the Astoria Savings Bank, \$700, April 4, 1914, George W. Sanborn, that was interest paid by you prior to——

A. Wait just a minute; was interest paid; that is the item of \$700 in our statement here; paid Astoria Savings Bank on April 4th, interest on notes, \$20,000.

Q. Now, is that additional liabilities paid by you?

A. That is one of the additional liabilities paid.

Q. \$700?

A. Yes, it was not in the original liability statement.

Q. That was paid on April 4, 1914, something over a month prior to the conveyance, and carried on the books of George W. Sanborn & Son?

A. Yes, sir.

Q. First National Bank of Portland, check of George W. Sanborn & Son, dated June 22, 1914, for \$75.00.

A. \$40.00 of that applied to old account; here is the item right here. Interest to 5/11/14; that is voucher 1769; that is additional.

Q. That is an additional amount of \$40.00?

A. Yes, interest applied up to May 11th, 1914.

Q. Was the Kake Packing Company the payer of these notes?

A. The notes are right here.

Q. You mean that some one of these are the notes?

A. This is the First National Bank notes here; Kake Packing Company, George W. Sanborn, president; F. P. Kendall, vice-president, and it is endorsed by F. P. Kendall and George W. Sanborn & Son, George W. Sanborn, secretary.

Q. Sanborn and Kendall are the sureties?

A. Yes, sureties, not endorsed; signed by them as part of the note.

MR. FULTON: Makers, as a matter of fact.

Q. Now, this check First National Bank, George W. Sanborn & Son, dated May 4, 1914, for \$75.00. Now is that what you call an additional liability, or additional payment?

A. Yes.

Q. That is additional payment?

A. That is additional payment.

Q. Paid on May 4, 1914, and the conveyance was May 12th.

A. Interest paid to May 6th, \$75.00.

Q. This check of June 8, 1914, addressed to First National Bank, Portland, Oregon, payable to yourself, for \$5075.00, signed by Sanborn & Son, is there anything additional in that check—any additional payment, what you call additional payment?

A. \$56.67 right there.

Q. Interest?

A. That is interest up to May 11, 1914, \$56.67; and the other is payment of the note, the other \$5000.00, I mean.

Q. These are notes of which the Kake Packing Company are makers with Kendall and yourself and son as endorsers?

A. We were endorsers, security; we secured the notes.

Q. March 2d, addressed to First National Bank, payable to yourself, check George W. Sanborn & Son, March 2, 1914, \$75.00.

A. That is additional payment.

Q. Additional payment?

A. On a note, interest.

Q. Paid on March 2, 1914?

A. Yes, that is in addition to the liabilities as listed here.

Q. Now, how did I understand you to say that the payment by George W. Sanborn & Son of \$31,010.88 was made?

A. \$20,000 of that amount was to the Astoria Savings Bank on notes given by Mr. Kendall and myself; the notes are here. The balance was by transfer. That is we guaranteed the notes, have the guaranty on them. You have the notes there.

Q. \$11,000 of it was simply transferred on the books?

A. Yes, \$11,010.88 is transferred on Sanborn Cutting Company's books, giving credit to George W. Sanborn & Son, and charging——

Q. Kake Packing Company with that amount?

A. Not Kake Packing Company, Kake purchase with the \$11,010.88. And George W. Sanborn & Son in turn credit Kake Packing Company and charge Sanborn Cutting Company. The books are both here, both ledgers, both sets of books.

Q. I understand the notes of which you speak are these three notes?

A. Four, there was four there.

Q. Is this it? These are the four notes.

A. Those are the four notes, Kake Packing Company, on which we guaranteed payment. These are the four.

Q. Now, were renewal notes given for these notes?

A. No, these are the original notes, I think.

Q. Those are the original notes, and were they paid by renewal notes?

A. No, I guess we paid by check and voucher here; they were paid December 11, 1915.

Q. On December 11, 1915?

A. Yes, sir.

MR. FULTON: I can't see the materiality whether paid by renewal notes or not so long as that canceled the other note.

A. The canceled notes are there; they are stamped paid, aren't they?

Q. Yes.

A. Well, they are not renewed; paid.

Q. Of course, I don't mean to doubt you, Mr. Sanborn, but the banks sometimes stamp "Paid."

A. I know they were paid in coin, by our check.

Q. That is what I want to find out, whether or not you paid them by actual check?

A. I thought I had voucher showing payment of them; that is George W. Sanborn voucher; that is our voucher with bill attached to it and canceled notes. That voucher states the date they were paid, December 11, I think it was, 1915.

Q. December 11, 1915?

A. Yes, sir.

Q. Now, F. P. Kendall, \$4160.35. I understand that was simply paid by transferring, giving Mr. Kendall credit on the books of the Sanborn Cutting Company for that amount?

A. And the Kake purchase charged, yes, sir. Transferred on Sanborn Cutting books to his personal account.

Q. To his personal account. The company of which you and Mr. Kendall are the sole owners. That is correct, isn't it?

A. I didn't testify to that. That is a corporation. I don't think——

Q. Well, your counsel admitted it; I understand he admitted it to the Court.

A. I didn't testify to it.

MR. FULTON: I said were the owners of the stock. I didn't say owners of the corporation.

A. We are the owners of the stock.

MR. FULTON: I assume that in equity they own the corporation.

Q. Now, the American Can Company, \$10,507.69.

A. You have already gone over that and had vouchers for it.

Q. I have already gone over that?

A. Yes, sir, you have checked the vouchers on that; one for \$7500; one for three thousand and something, and one for \$100.00; we paid them \$11,129 in place of ten thousand. The balance was interest.

Q. I don't care to go over it if I have already gone over it.

A. You have already been over it and checked the vouchers.

Q. Well, can you say—the vouchers show the date they are paid, wouldn't they?

A. What do you mean by the vouchers?

Q. I mean the vouchers of the American Can Company would show the date?

A. Our vouchers would show date of payment.

Q. That \$10,507 was paid, the additional amount.

A. You have already checked those. You have them in there.

Q. Now, I understand, Mr. Sanborn, that this is a statement of assets and liabilities that was prepared for Mr. Kirberger, and used in connection with your let-

ter to him under date of March 21, 1914, when he was writing——

A. Prepared by who?

MR. FULTON: What are you talking about when you say, "What is this"?

MR. ROBERTSON: Defendants' Exhibit "E."

A. You say was prepared?

Q. Yes.

A. Mr. Kirberger prepared it.

Q. And you used it in connection with your letter of March 21, 1914?

A. Yes, sir.

Q. To Mr. Kirberger?

A. Yes, sir.

Q. And at that time you understood, didn't you, that Mr. Kirberger was endeavoring to interest certain people back east?

A. He was endeavoring to sell, I think, the plant, in connection with himself, to himself and certain connections he had east.

Q. And at that time, as I understand, Mr. Sanborn, you were very anxious to get out of the Kake Packing Company?

A. I surely was.

Q. And you felt, or didn't you, at that time, that the outlook for the Kake Packing Company was very poor?

A. Why, I think I testified Saturday that I had refused to go on with it under the old management, and it was a question of either Mr. Kirberger and his friends

buying Mr. Kendall and myself out, or we buying them out. That was the understanding.

Q. And you had at that time no thought in mind, or desire, to in any ways simply increase the capital stock, and hold your share. You wanted to leave the corporation?

A. I think—I did want to leave the corporation, and I think in our talk with Mr. Kirberger—I think I stated that to you—if he could succeed in inducing capital to come in and put in new management, we would still retain our stock. That is my remembrance of it.

Q. At that time the only pressing liability was some \$30,000; isn't that true?

A. No, the whole thing was pressing. I was pressing; I don't remember just how much was really pressing, the Kake Packing Company owed us much money.

Q. Certainly.

A. Part of it we were endorsers for; in fact, I think the biggest part of it, some \$60,000—whatever it shows there.

Q. And of that \$60,000, there was some \$30,000 that was rather insistent on being paid, what you might call pressing?

A. Well, I wouldn't want to testify as to how much was pressing, because I don't remember.

Q. Well, you don't mean all of it was being—you weren't pressed for all of it, were you?

A. Why, if Mr. Kendall and myself hadn't been endorsers on the notes, the whole thing I guess would have gone into bankruptcy.

Q. And the reason at that time—you and Mr. Kendall having endorsed the paper and guaranteed the debts

of the Kake Packing Company, you didn't feel that you were in position to aid them for the year 1914. on account of other business propositions you had up. Isn't that correct?

A. No. I have already testified I wouldn't go into it on account of the management.

Q. On account of the management?

A. And also of course, I didn't have any more money to put up. Didn't care to put up any more money.

Q. And you limit that——

A. It was a question of either cleaning up the plant one way or another——

Q. And neither you nor Mr. Kendall were at all anxious to remain in the corporation, or any connection?

A. Not under that management.

Q. And that was the understanding with Mr. Kirberger, was it?

A. The understanding with Mr. Kirberger was that—I think under the March 11th agreement, either he was to take the plant or we were to take it.

Q. March 21st, you mean?

A. March 21st.

Q. Now, at that time, I understand from your pleadings, that you say the stock was absolutely worthless.

A. Yes, sir, I think the books show that.

Q. Well, weren't you desirous at that time of getting Mr. Wallbridge to take an option on the stock of yourself and Mr. Kendall?

A. No, I had nothing to do with Mr. Wallbridge. I had nothing to do with him; that was one of Mr. Kir-

berger's men. I was anxious to sell out; as I said, I was anxious to sell out our interest, give them our stock; pay the indebtedness and give them \$10,000, that is sell it back to them for \$10,000 less than the liabilities. That was my proposition to him. In other words, lose \$27,000 odd dollars. Any way, to get out of it.

Q. And through Mr. Kirberger, didn't you endeavor to get Mr. Wallbridge to buy your stock at par?

A. No, no, no.

Q. Or get him to take an option on your stock at par?

A. No, no, no.

Q. You didn't do anything of that kind?

A. No, sir.

Q. Let me refresh your mind on that: Now, you were going to lose \$27,000, and Mr. Kirberger, the Kake Trading & Packing Company was in position to lose considerable money, too, wasn't it?

A. Well, he had endorsed over to us, or rather sold to us for this consideration—sold us claim for \$8500 and agreed to transfer his stock.

Q. You understood at the time of that assignment, on January 6, 1914, that was a just debt the Kake Packing Company owed the Kake Trading & Packing Company?

A. What do you mean, previous to the transfer?

Q. Yes.

A. Yes, sir.

Q. And something the Kake Packing Company, the cannery, had purchased from the Kake Trading & Packing Company?

A. Yes, sir.

Q. You also understood, didn't you, or you knew of your own knowledge, that Mr. Kirberger himself had, through conveyances from the Kake Trading & Packing Company, through the deed, and through the payment of another amount of \$4000, paid into the Kake Packing Company \$12,500.00, didn't you?

A. You mean Mr. Kirberger, personally?

Q. I mean Mr. Kirberger—I mean the Kake Trading & Packing Company.

A. I don't understand it that way, no. I supposed the stock belonged—it was issued to Mr. Kirberger, \$12,500.

Q. You knew, however, it was paid by conveyances—or you gave check for \$8500 in consideration of conveyances from the Kake Trading & Packing Company, didn't you?

A. My understanding was that Mr. Kirberger owned the entire stock of the company, of the Kake Trading & Packing Company; that practically it was one outfit, whether it was Ernest Kirberger, or the Kake Trading & Packing Company. I still so think.

Q. You don't wish to say that you do not know the conveyances are from the Kake Trading & Packing Company, do you? .

A. I think I do know that. The conveyances came from the Kake Trading & Packing Company, although that was paid to Mr. Kirberger; he was making all these deals himself. He was president and manager of the Kake Packing Company.

Q. You also knew that \$4000.00 of it was paid by bill which the Kake Packing Company owed to the Kake Trading & Packing Company, for which you sent check up to Mr. Kirberger?

A. I had forgotten that until it came out at the trial here.

Q. Now, with your memory refreshed, you know that was correct?

A. Yes, sir.

Q. That \$4000 stock was paid by another account of \$4000 which the Kake Packing Company owed the Kake Trading & Packing Company.

A. I know the Kake Packing Company sent their check to the Kake Trading & Packing Company, or to Mr. Kirberger, with endorsement on the back, to endorse it and send it back to Mr. Gorden, who was then treasurer, in payment of Mr. Kirberger's stock. The check itself speaks for that.

Q. And the check was given in payment of advances through the store made to the Kake Packing Company?

A. Yes, sir, advances and merchandise.

Q. Certainly. When I say advances, I don't necessarily mean just cash advances. I mean mercantile advances as well as cash advances. Now, you know that Mr. A. C. Kirberger, Mr. Ernest Kirberger's brother, had put in \$6000, or \$5000; \$5000, I believe.

A. I think it is six.

Q. Yes, six thousand.

A. His subscription is there.

Q. It is six, I agree with you.

A. Yes.

Q. You knew, at that time, didn't you, Mr. Sanborn, that they would lose that, all that stock?

A. Why, most assuredly I did, as well as the balance of the stockholders of the Kake Packing Company. I lost mine.

Q. You look at this, Mr. Sanborn, and see if you recognize this handwriting.

A. I think that is Mr. Kendall's writing.

Q. Did you ever see that before?

A. This part of it here—there is some of it here that is mine.

Q. Did you ever see it before?

A. Why, I probably did. I haven't read it.

Q. Do you recall the making of that?

A. Why. I think this is some telegram that Mr. Kirberger sent east. I don't know who it was sent to; whether sent to Morck or sent to Wallbridge.

Q. Made up by yourself and Mr. Kendall?

A. This was made by Kendall.

Q. I call your attention, isn't this your writing in there, too? Isn't that your writing?

A. Yes, this is.

Q. Isn't it your writing right here?

A. Yes, "pay off," yes.

Q. I thought I could tell your writing if I saw it.

A. I don't know whether that telegram went or not. You probably have a copy of the telegram if it did; that is a memorandum made up. I don't know whether for telegram or letter. Probably got it if it did go.

Q. You understood at the time—your recollection was——

A. What is the date of that?

Q. No date on this at all that I know of. You can look yourself.

A. Was it before his trip east or after his trip east?

Q. I don't know a thing about it except I see in your handwriting.

A. I don't either. Just merely a memorandum and I don't know whether before his trip east or after his trip east. No date on it.

Q. Not that I know of.

A. You must have the original telegram.

Q. No, I haven't the original telegram of that. I will be perfectly honest with you. I haven't the original telegram of it.

A. Yes.

Q. Now, in here where you state——

A. I don't state; there is nothing to show that ever went.

Q. Well, where Mr. Kendall states—were you and Mr. Kendall busy down in Astoria making—amusing yourselves by drawing up letters like this?

A. Why that is——

Q. Or telegrams?

A. That may never have gone for all I know. I don't know whether went or not.

Q. Certainly not, but you don't mean to say either you or Mr. Kendall were sitting down writing stuff not the truth?

A. Have already testified that the Trading Company had the Kake Packing Company.

MR. ROBERTSON: I want to read this.

MR. FULTON: What is this you have?

A. It is a memorandum.

MR. FULTON: I object to it. I would like to look at it. I don't think you can examine this witness unless I look at it. If the Court please, I object to any interrogatories being propounded in regard to that document. I would like to have your honor look at it. Absolutely nothing to do with the case, and is evidently a telegram of some kind prepared for Mr. Kirberger.

MR. CROSSLEY: To send east.

MR. FULTON: Refers to his store; only refers to his store. It isn't a statement signed by either of these gentlemen; can't have any application to this case directly or indirectly.

MR. CROSSLEY: Mr. Sanborn admits it was made up mainly of Mr. Kendall's writing, some of his own. I think can certainly be used as an admission against defendants.

COURT: It seems to refer to this Packing Company in some way. I don't know what bearing it would have. You can read it anyway.

MR. ROBERTSON: (Reading) "At meeting of Kake Packing Company held today the question of increasing capital stock from fifty to one hundred and

twenty-five thousand dollars was considered but not decided positively. If this were done it would leave approximately eighty thousand dollars treasury stock which the company will sell for fifty thousand dollars. Would you prefer a proposition of this nature in lieu of purchasing entire plant as previously outlined. If so what portion of treasury stock would you agree to purchase? It would be necessary to have at least twenty-five thousand paid in by June first and balance by July first to enable us to operate this season. It is agreed that entire proceeds of all stock sold shall be used for operation this season and for paying off pressing liabilities. Sanborn and Kendall anxious to retain their interest in company as they feel that the business is good and will ultimately be big success, but they are unable to finance it this year owing to heavy demands in other directions; they will however give you an option on their stock till December first at par." Then on the margin is written: "Under this arrangement, large proportion of liabilities could be arranged to carry over until end of season." "Providing you should subscribe for the treasury stock above mentioned. I consider it essential to operate our mild-cured salmon this year, even if cannery is not operated as market conditions are favorable and fishing prospects good for nice profit. The proposition herein outlined appeals to me and am willing to put in my store property for fifteen thousand dollars, stock as previously stated. If this strikes you favorable Kendall and Sanborn desire refer you to H. W. Phelps of American Can Company as to business standing."

Thereupon, counsel for plaintiff offered said memorandum in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "72," and made a part hereof.

MR. FULTON: I object as incompetent and not within the issues.

COURT: It will be admitted subject to your objection.

Q. Mr. Sanborn, do you have with you in Court the stock certificate book of the Sanborn Cutting Company?

A. Sanborn Cutting Company?

Q. Yes.

A. I don't think so.

MR. ROBERTSON: I would like to see that book very much, your honor. In our motion, and in our telegram to Mr. Fulton last Tuesday we asked him to bring that book into Court.

MR. FULTON: Stock book?

MR. ROBERTSON: Stock certificate book, Mr. Fulton. I think we did.

MR. FULTON: I don't see the materiality. We admit Sanborn and Kendall have the stock.

COURT: I should think that would be sufficient.

MR. CROSSLEY: Just want to examine, if the Court please.

COURT: They have admitted these two gentlemen own the stock of the company, and that is as far as you have a right to inquire into their books.

Q. Did I understand you to tell the Court Saturday, Mr. Sanborn, that you still had on hand some canned salmon and cannery supplies at Astoria, which you took over from the Kake Packing Company?

A. I don't think I said we had any canned salmon. The item of assets that we went over, if you will hand me that. Lumber I think is what I said, unless it was all used up.

Q. Which statement do you wish, March 21st?

A. March 21st is the one. Tierces is another item I mentioned that we still had on hand.

Q. Did you dispose of all of your canned salmon?

A. Yes, I think the salmon is all cleaned up; pickled salmon was all cleaned up. Part of it, as I testified, we sent to the Bonneville hatchery for feeding fish.

Q. The reason I ask you, Mr. Sanborn, is simply that I notice in the answer of the Sanborn Cutting Company in the suit at Juneau you said the Sanborn Cutting Company had no longer in its possession any canned salmon, tin or cannery supplies so transferred to it, in its possession. I simply wanted to find out; I guess a little confusion in my mind, and I simply wanted to find out whether you did have or didn't have. However, the inventory will show.

A. The inventory will show. I think we still have some tierces on hand. Whether or not any of that same lumber is on hand, I couldn't say.

REDIRECT EXAMINATION:

By Mr. Fulton:

Q. You were interrogated this morning, Mr. Sanborn, in regard to this document that I now hand you. What is this document?

A. This is a statement of bills paid by George W. Sanborn & Son after—the books were made up in January, if I remember right, or March; whichever the balance shows there—March 19th, the balance starts. That was the balance our statement shows there with the exception of one item of \$332.78, which is duplicate charge, and these are the items that we paid between that time and March 11th—May 11th.

Q. You mean these items are the items shown on the first page.

A. Items shown on first page, and these are credits for stuff sold out of the assets; the first column are debits, money paid out, and the second column are credits given the Kake account for returned——

Q. What are these documents attached to it?

A. Those are account sales of salmon, showing net proceeds.

Q. Is that your statement of your account that that time—statement of account of George W. Sanborn & Son?

A. This is statement Kake Packing Company; George W. Sanborn & Son, with the Kake Packing Company on the date that we turned it over to the Sanborn Cutting Company.

Q. That is when you made your transfer.

A. May 11th.

MR. FULTON: We offer this document in evidence.

MR. ROBERTSON: Of course, I don't hardly think the statement has been shown to be a true and correct copy from the books as yet. I suppose, Mr. Sanborn, this is a true and correct excerpt from your books of what it purports to be.

A. Yes, sir.

MR. ROBERTSON: I don't know that I have any valid objection to it.

Thereupon counsel for defendants offered said document in evidence and the same was received and read in evidence, and is hereunto attached, marked Defendants' Exhibit "N," and made a part hereof. Plaintiff's Exhibits 73 and 73-a were offered, received in evidence, and marked, and hereunto attached and made a part hereof.

Thereupon defendants rested.

Thereupon the plaintiff called as a witness on his behalf

ERNEST KIRBERGER

who being first duly sworn, on oath testified as follows:

Interrogated by Mr. Robertson:

Mr. Kirberger, you will recall that when you were on the stand the other day I offered in evidence a statement showing assets and liabilities, or resources of the Kake Trading and Packing Company on January 6,

1914, not including however, in that the \$12,500 stock in the Kake Packing Company nor the account of \$8582.21, nor the account of \$1750, and at that time the Court said we were to file with this exhibit an itemized statement of the accounts payable. Now, do you have with you an itemized statement of the accounts payable?

A. Yes, sir, I have had such a statement prepared from the books of the Trading Company, and it is a true and correct copy to the best of my knowledge. In the first sheet, in going over this statement with the adding machine, I found a difference in the total. The statement of accounts payable should have been \$21,469.33, instead of \$18,145.89.

COURT: Is that all the liabilities of the company at that time?

A. Yes, sir.

MR. ROBERTSON:

Q. Now, does that include the account of yourself for \$1466.27?

A. No, sir.

COURT: It doesn't include it?

A. It does not, no, sir.

Q. The \$21,469.33, Mr. Kirberger—the fourteen hundred and some odd dollars due yourself?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said statement in evidence. The defendants, by their attorneys,

then and there objected to the same upon the ground that it was irrelevant, immaterial and incompetent, and not the best evidence, but the Court overruled said objection and allowed the defendants an exception.

Said statement was then received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "67a" and attached to Plaintiff's Exhibit "67."

MR. ROBERTSON:

Q. Now, Mr. Kirberger, where do you have—in what book do you show the account of the Kake Trading & Packing Company against the Kake Packing Company?

A. In that blue ledger.

Q. Do you have the account there?

A. Yes, sir.

Q. Against the Kake Packing Company?

A. Yes, sir.

Q. On January 6, 1914?

A. Yes, sir.

Q. What page is that?

A. Page 23.

Q. Does that show the entire thing?

A. Yes, there is the debit side; there is the credit.

Thereupon, counsel for plaintiff offered, and there was received in evidence, the said page of said book, and the same is hereunto attached, marked Plaintiff's Exhibit "Q," and made a part hereof.

Q. Now, you heard Mr. Sanbron state he didn't assist you in making that up. Making up this statement

of liabilities and assets of the Kake Packing Company. Will you kindly state whether or not Mr. Sanborn did assist you in making that up?

A. My recollection of the matter is that in making that statement there that is in the minute book, I believe of the Kake Packing Company, that I wrote the items down, but Mr. Sanborn and I had conferred together over all the different items in the entire statement, and which he understood and I understood and both agreed to, as being correct as far as we knew at that time. If there was any errors in the books in regard to any of these points there, why he or I didn't know it at that particular time we made out that statement, and as far as I know Mr. Sanborn assisted me in looking over the different items, and seeing if they were correct, but I copied that statement by myself, if I remember correctly, on the typewriter.

Witness excused.

Thereupon, defendants, by their attorneys, moved to strike out from the testimony and withdraw the same from the consideration of the Court, Plaintiff's Exhibits "67" and "67a," upon the ground that the same were not competent, because the books from which the statement is purported to be made were not offered in evidence.

Thereupon, by permission from the Court, counsel for plaintiff recalled

ERNEST KIRBERGER.

DIRECT EXAMINATION:

By Mr. Robertson:

Q. Now, Mr. Kirberger, do you recognize this book?

A. Yes, sir.

Q. Do you know what it is?

A. Yes, sir.

Q. And what is it?

A. A ledger of the Kake Trading & Packing Company.

Q. Was it kept by you or under your supervision?

A. Yes.

Q. Do you know whether it contains true and correct ledger accounts and statements of the business of the Kake Trading & Packing Company?

A. Yes, sir, I do.

MR. ROBERTSON: We ask that it be received in evidence, if the Court please.

Thereupon, counsel for plaintiff offered said ledger in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "R," and made a part hereof.

MR. FENTON: Object as immaterial.

MR. ROBERTSON: It makes it a little hard on the trustee in bankruptcy, in Alaska, to settle the estate, with the books down here, but we will have to do it, if the Court insists.

Q. Do you recognize this book, Mr. Kirberger?

A. Yes, sir.

Q. What is that?

A. Ledger Kake Trading & Packing Company.

Q. Kept by you or under your supervision?

A. Yes, sir.

Q. And does it contain true and correct ledger accounts of the business?

A. Yes, sir.

Q. Of the Kake Trading & Packing Company.

MR. ROBERTSON: I offer this in evidence.

MR. FULTON: Object as immaterial.

Thereupon, counsel for plaintiff offered said ledger in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "S," and made a part hereof.

Q. These sheets that are bound together like that, will you state what they are?

A. They are loose leaves, extra leaves of some account in the ledger; duplicate account in there—extra leaves.

Q. Extra ledger accounts?

A. Extra ledger account.

Q. They were kept under your supervision?

A. Yes, sir.

Q. Or by you?

A. Yes, sir.

Q. And do they contain true and correct statements of the ledger business.

A. Yes, sir.

Thereupon, counsel for plaintiff offered the same in evidence, and the same were received and read in evidence, and are hereunto attached, marked Plaintiff's Exhibit "T," and made a part hereof.

MR. FULTON: We object as immaterial.

Q. What book is this?

A. That is the journal—it is a day book.

Q. Is there anything in this day book—do you in any wise have to use this day book in making up that statement?

A. I don't think so; I think not. No, sir, I don't think it pertains to this account at all.

Q. But it is a true and correct day book, showing transactions?

A. True and correct day book of the Kake Trading & Packing Company, but doesn't apply to this business here now.

Thereupon, counsel for plaintiff offered said day book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "U," and made a part hereof.

Q. What book is this?

A. Invoice book.

Q. Of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Does it contain true and correct statements of the invoices of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept in the regular course of business?

A. Yes, sir.

Q. Under your supervision?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said invoice book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "V," and made a part hereof.

MR. FULTON: What do you mean by invoice book?

A. That shows the purchases — purchase of merchandise. They are all entered in there, and at the end of the month posted to debit of merchandise account.

Q. What is this book?

A. That is the current day book.

Q. Of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept in the regular course of business?

A. Yes, sir.

Q. And contains true and correct statements of the transactions of the Kake Trading & Packing Company?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said current day book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "W," and made a part hereof.

Q. This book?

A. That is also a current day book.

Q. Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept by you or under your supervision?

A. Yes, sir.

Q. And contains a true and correct statement of the business transacted by the Kake Trading & Packing Company?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said current day book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "X" and made a part hereof.

Q. What is this book?

A. That is also a day book—yes, a day book?

Q. Of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Does it contain a true and correct statement of the transaction of the business of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept by you or under your supervision?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said day book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "Y," and made a part hereof.

Q. What is this book, Mr. Kirberger?

A. Current day book.

Q. Of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Contains true and correct statement of the business of the Kake Trading & Packing Company?

A. Yes, sir.

Q. To the best of your knowledge, and kept by you or under your supervision?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said current day book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "Z," and made a part hereof.

Q. And this book, what is this?

A. That is a day book, a current day book.

Q. And contains a true and correct statement of the business of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept by you or under your supervision?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said current day book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "AA," and made a part hereof.

Q. What is this book? How far back is that?

A. That goes back to 1909. I don't know whether that would have anything in there or not which bears on the subject.

Q. We will offer it; maybe the attorneys wish to look over it. What is it, a day book?

A. Day book, yes.

Q. Contains statement, day book statement of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept in the ordinary course of business?

A. Yes, sir.

Q. Correct to the best of your knowledge?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said day book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "BB," and made a part hereof.

Q. What is this book?

A. Cash book, I think. It is a petty cash book we have there. We copy that, keep in the main cash book, counter cash book.

Q. Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept by you in the regular course of business?

A. Yes, sir.

Q. True and correct to the best of your knowledge?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said cash book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "CC," and made a part hereof.

Q. What is this book?

A. That is a cash book.

Q. Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept by you or under your supervision?

A. Yes, sir.

Q. Does it contain a true and correct account of the cash book entries of the Kake Trading & Packing Company?

A. Yes, sir.

Q. To the best of your knowledge?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said cash book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "DD," and made a part hereof.

Q. What is this book, Mr. Kirberger?

A. That is cash book also.

Q. Of Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept by you or under your supervision?

A. Yes, sir.

Q. And does it contain to the best of your knowledge true and correct statement of the cash book entries of the Kake Trading & Packing Company?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said cash book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "EE," and made a part hereof.

Q. What is this book, Mr. Kirberger?

A. Journal.

Q. Of the Kake Trading & Packing Company?

A. Yes, sir.

Q. Does it contain true and correct journal entries of the Kake Trading & Packing Company?

A. Yes, sir.

Q. To the best of your knowledge?

A. Yes, sir.

Q. And kept in the ordinary course of business?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said journal in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "FF," and made a part hereof.

Q. What is this book, Mr. Kirberger?

A. That is also a journal.

Q. Kake Trading & Packing Company?

A. Yes, sir.

Q. Kept by you or under your supervision?

A. Yes, sir.

Q. In the ordinary course of business?

A. Yes, sir.

Q. And to the best of your knowledge contains true and correct statements of the journal entries of the Kake Trading & Packing Company?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said journal in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "GG," and made a part hereof.

Q. What is this book?

A. That is the minute book of the Kake Trading & Packing Company, showing by-laws, articles of incorporation, etc.

Q. I seem to have two books. Do you know who prepared the book?

A. Mr. Turner of Seattle, Washington; Leland T. Turner, I believe.

MR. FULTON: What was it? Record of minutes of meetings of Board of Directors and Stockholders.

MR. ROBERTSON: Contains the by-laws; the by-laws are in the other book.

COURT: In two different books?

MR. ROBERTSON: It seems to me it would lengthen the record to put it in.

Q. The court wants to know if kept in two minute books?

A. When we organized the attorney put that in there and had that other one there. I don't know what the particular reason for it was, but we had the two books when we organized.

MR. FULTON: Nothing in it, your Honor, of any importance.

COURT: Very well.

MR. ROBERTSON: It seems to me it would just encumber the record.

MR. FULTON: It seems to me ought to be put in on the same principle you are putting the others in, but I don't insist.

Q. Now, what is this book?

A. Stock book.

Q. Kake Trading & Packing Company?

A. Yes, sir.

Q. And do you know who kept it?

A. Yes, sir.

Q. In whose possession has it been?

A. Kake Trading & Packing Company.

Q. Regular stock book?

A. Yes, sir.

Thereupon, counsel for plaintiff offered said stock book in evidence, and the same was received and read in evidence, and is hereunto attached, marked Plaintiff's Exhibit "HH," and made a part hereof.

PLAINTIFF RESTS.

Thereupon, counsel for defendants moved the Court to strike out and withdraw from the evidence, Plaintiff's Exhibits "R," "S," "T," "U," "V," "W," "X," "Y," "Z," "AA," "BB," "CC," "DD," "EE," "FF," "GG" and "HH," and each thereof, upon the ground that plaintiff has not identified a single statement or item in the statement, Plaintiff's Exhibits "67" and "67a," as being taken from the books offered in evidence, and there is no testimony or evidence showing that such statement was taken from the books, or either thereof.

COURT: Witness testified they were made up from the books. But the Court overruled said objections, and each thereof, to which ruling of the court the defendants, by their attorneys, then and there excepted, and the exceptions were duly allowed by the Court.

Thereupon, both parties rested.

The above and foregoing condensed statement of the testimony and evidence taken and admitted at the trial of the above entitled cause for use in the appeal herein, together with the exhibits therein referred to and hereunto attached, was duly presented to the undersigned, Judge of the above entitled Court, before whom said cause was tried, and the same has been duly examined and found to be a true, complete and properly prepared condensed statement of all the testimony and evidence offered, taken, received and admitted at the trial of said cause, and the same is hereby in all respects approved, this 19th day of September, A. D. 1916.

R. S. BEAN,

Judge of the United States District Court, for the District of Oregon.

Filed September 20. 1916.

G. H. MARSH, Clerk.

And, to-wit, on Tuesday, the 25th day of July, 1916, the same being the 19th judicial day of the regular July, 1916, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS.

It satisfactorily appearing to the Court that all the exhibits offered and received in evidence in this cause should be inspected by the Appellate Court, on the appeal in this cause:

It is therefore ordered that all the original exhibits offered and rejected and offered and received in evidence at the trial of this cause be certified up with the record, by the Clerk of this Court, to the United States Circuit Court of Appeals, for the Ninth Circuit, and such exhibits need not be included in the printed abstract of record.

R. S. BEAN,

Judge of the United States District Court, for the
District of Oregon.

Filed, July 25, 1916. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 25th day of July, 1916, there was duly filed in said Court and cause, a Praecipe for Transcript of Record, in words and figures as follows, to-wit:

PRAECIPE FOR TRANSCRIPT.

*In the District Court of the United States, for the
District of Oregon.*

To the Clerk of the Above-entitled Court:

The above named defendant Sanborn-Cutting Co., appellant herein, herein designates the portions of the record which such defendant desires to have incorporated in the transcript on the appeal in this case, namely:

(1) Bill of Complaint.

(2) Separate Answer of defendant Sanborn-Cutting Co.

(3) Reply of plaintiff to separate answer of defendant Sanborn-Cutting Co.

(4) Stipulation for consolidation of case pending in the District Court of the United States, for the District of Alaska, with this case.

(5) All pleadings set forth and described in the stipulation consolidating the cases hereinabove referred to in paragraph (4) herein.

(6) Appellant's petition for appeal and order allowing same and fixing amount of supersedeas bond.

(7) Assignments of Error.

(8) Supersedeas Bond and approval.

(9) Citation on appeal, with proof of service thereof.

(10) Notice of lodgment of brief statement of evidence with the Clerk, with proof of service thereof.

(11) Order of the Court, of date July 25, 1916, directing certification of exhibits.

(12) Statement of the evidence, as approved by the Court.

(13) Final judgment and decree and opinion of the Court.

G. C. AND A. C. FULTON,

Attorneys for Defendant Sanborn-Cutting Co.

STATE OF OREGON,

County of Clatsop—ss.

Due service of the within Praecipe for Record is hereby accepted in said county and state, this 25th day of July, 1916.

JAMES J. CROSSLEY,

Attorney for Plaintiff,

By J. N. Hart.

Filed, July 25, 1916

G. H. MARSH, Clerk.

UNITED STATES OF AMERICA,

District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing printed transcript of record on appeal, in the case in which V. A. Paine, Trustee of the Kake Trading and Packing Company, a corporation, Bankrupt, is plaintiff and appellee, and Sanborn-Cutting Co., a corporation, is defendant and appellant, in accordance with the law and the rules of Court, and in accordance with the direction of the praecipe for transcript filed by said appellant in said cause; and I further certify that the foregoing transcript is a full, true, and correct transcript of the record and proceedings had in said Court in said cause, which the said praecipe designated to be included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that in accordance with the order of this court appearing in the foregoing printed transcript of record, I have transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as a part of the record in said cause on appeal, the following original exhibits, viz.:

Plaintiff's Exhibits 1 to 30 inclusive, 30a, 30b, 30c, 31 to 57 inclusive, 58a, 58b, 59 to 73 inclusive, 73a, and Plaintiff's Exhibits R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG and HH; and Defendant's Exhibits A to N and Defendant's Exhibit Q, said ex-

hibits being all of the exhibits on file in said cause in my custody.

And I further certify that the cost of the foregoing transcript of record is \$. for clerk's fees, and \$. for printing said transcript, and that the same has been paid by said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this. day of December, A. D. 1916.

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Clerk.

No. 2898

United States CIRCUIT COURT OF APPEALS For the Ninth Circuit

SANBORN-CUTTING COMPANY,
a corporation,

Appellant,

vs.

V. A. PAINE, as Trustee of the Kake
Trading and Packing Company, a
corporation, Bankrupt,

Appellee.

BRIEF FOR APPELLANT—Sanborn-Cutting Co.

**On Appeal from the District Court of the United
States for the District of Oregon**
Hon. R. S. Bean, District Judge

GUNNISON & ROBERTSON, Juneau, Alaska,
JAMES J. CROSSLEY, Portland, Oregon,
Attorneys for Appellee.

G. C. & A. C. FULTON, Astoria, Oregon,
Attorneys for Appellant.

Filed this..... day of..... 191.....

JAN 29 1917

F. D. Monckton,

Clerk.

United States CIRCUIT COURT OF APPEALS For the Ninth Circuit

SANBORN-CUTTING COMPANY,
a corporation,

Appellant,

vs.

V. A. PAINE, as Trustee of the Kake
Trading and Packing Company, a
corporation, Bankrupt,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

On the 6th day of December, 1915, the appellee, as Trustee of the Kake Trading and Packing Company, bankrupt, instituted a suit in the District Court of the United States for the District of Oregon, as plaintiff, against F. P. Kendall, George W. Sanborn, S. S. Gordon, Kake Packing Company, a corporation,

and the appellant Sanborn-Cutting Co., a corporation, as defendants.

On the same day, the appellee, as Trustee of the Kake Trading and Packing Company, also instituted another suit in the District Court of the United States for the District of Alaska, Division No. 1, at Juneau, as plaintiff, against the Kake Packing Co., a corporation, and appellant Sanborn-Cutting Co., a corporation, as defendants. Process was served upon the appellant Sanborn-Cutting Co. in each case, and it appeared and filed its answer in each case.

The causes of suit set forth in the two complaints are entirely dissimilar in theory, although they relate to and cover the identical transaction.

The suit instituted in the District Court of the United States for the District of Oregon sets up substantially the following cause of suit, namely:

After alleging the fact that the suit is instituted on behalf of himself, as Trustee of the Kake Trading & Packing Company, a corporation, bankrupt, and for and on behalf of all of the stockholders of the Kake Packing Company similarly situated, and after alleging the incorporation of the Kake Trading and Packing Company and its bankruptcy, and the appointment of appellee as Trustee and his qualifications, and the incorporation of the Kake Packing Co. and of the appellant, it is alleged

(1) That one Ernest Kirberger was at all the times mentioned, the President and General Manag-

er of the Kake Trading and Packing Co., and the owner of the majority stock thereof, and as such conducted and carried on the business of such corporation, and had so conducted such business for a long number of years prior to the 9th day of April, 1915, and that it had become possessed of certain lands, buildings and water rights and other property valuable in the fishing and packing industry, and had been engaged in the business of mild curing fish.

(2) That on February 19, 1912, Kirberger, Sanborn, Kendall and Gordon organized the Kake Packing Co., with a capital stock of \$50,000.00, divided into 500 shares, each of the par value of \$100.00. That Kendall subscribed and paid for 85 shares; Gordon subscribed and paid for 60 shares; F. H. Sanborn subscribed and paid for 10 shares; Geo. W. Sanborn subscribed and paid for 85 shares; G. C. Fulton subscribed and paid for 20 shares; and A. C. Kirberger subscribed and paid for 60 shares. That Kirberger personally subscribed for 125 shares, and that he paid for such shares by causing the Kake Trading and Packing Company to transfer to the Kake Packing Co. certain lands, buildings and water rights and other property then owned by the Kake Trading and Packing Company, at the agreed price of \$8500.00, the balance in cash belonging to the Trading Company. Hence, it is alleged that the stock belonged to and was the property of the Trading Company.

(3) It is then alleged that on the 14th day of January, 1914, the defendants Kendall and Sanborn, for the purpose of depriving the Trading Company of its 125 shares of stock, fraudulently induced Kirberger to assign the same to them; that said assignment was without any consideration whatever and a fraud upon the Trading Company.

(4) It is then alleged that on May 11, 1914, the Kake Packing Co., whose stockholders and directors were Geo. W. Sanborn, Kendall, Gordon, Fulton and F. H. Sanborn, through the fraud of Sanborn, Kendall and Gordon, transferred the assets of the Kake Packing Co. to the Sanborn-Cutting Co. without any consideration whatever, for the purpose of defrauding the stockholders, and that such transfer had that effect.

The prayer of the complaint is that the Sanborn-Cutting Co. be required to make an accounting of its operation and conduct of the Kake Packing Company, and be required to restore and return the business and assets thereof and earnings thereof to the Kake Packing Co., and to account to the Kake Trading and Packing Company for the 125 shares of stock, and also that the Kake Trading and Packing Company have judgment against Sanborn, Kendall and Gordon for \$12,500.00, and for a reconveyance from the Sanborn-Cutting Co. of all property conveyed to it by the Kake Packing Co.

It will thus be observed that the suit is in the nature of a suit brought by a stockholder to have

set aside a sale of the assets of the corporation and for an accounting.

To this complaint, the appellant filed its separate answer, wherein it denied specifically all the allegations of fraud, and (1) admitted the transfer to it of the assets of the Kake Packing Co., but alleged that the same were transferred to it for a valuable consideration, which it paid; in fact, for a consideration far in excess of the actual value thereof. That the value of the assets of the Kake Packing Co. did not exceed the sum of \$60,000.00, and that it paid therefor, as a matter of fact, \$81,177.18, an excess of \$21,177.18 above the fair and reasonable value thereof.

(2) The appellant also set out fully the facts pertaining to the transaction, showing that the sale was made at the request of Kirberger, who voted the stock in his name, which it was claimed belonged to the Trading Company, and forwarded the sale to it, and who was at that time the President and General Manager of the Packing Company, and it was through his efforts that the sale was consummated, and that the stock owned by the Trading Company voted favorably to the sale.

(3) It is further alleged that immediately upon the assignment of the assets of the corporation which occurred on May 11, 1914, the appellant took possession of the property assigned to it, and has been in possession ever since.

(4) The appellant disclaimed ownership of 125 shares of the Kake Packing Company, and alleged the same has always been in the name of Kirberger, and that Kirberger always voted it at all stockholders' meetings.

The evidence offered at the trial of the case wholly failed to sustain the allegations of the complaint in the above mentioned case, that is, the suit instituted in Oregon, the appellee have failed to prove fraud, or failure of consideration, or inadequate consideration, and it having been proven that Kirberger, who voted the stock for the appellee, voted in favor of the sale, and that the sale was honestly and fairly made and the proceedings were honestly and fairly conducted, this suit naturally failed. In fact, the Court below in its opinion employed the following language, namely: (pg. 152, abstract).

“The defendant Gordon took no part in the transactions out of which this controversy arose, and as to him, the suit should be dismissed without cost. The pleadings abound in charges of fraud and misconduct on the part of defendants Sanborn and Kendall, but such charges are not sustained by the testimony. The evidence shows quite clearly that there was no actual fraud or moral turpitude in any of the transactions involved in this suit, but that all

parties concerned, including Kirberger, acted in the utmost good faith and with no intention to wrong any one. The only question is the legal effect of what they did."

It shall be our contention that the evidence was wholly insufficient to sustain the allegations of the complaint in the Oregon suit.

ALASKA SUIT

The suit instituted in Alaska, as we have stated, is based upon an entirely different theory and different state of facts. The complaint in that case, page 167, abstract, alleges:

(1) That the appellee, as Trustee of the Kake Trading and Packing Company brings the suit on behalf of himself, as Trustee, and on behalf of other **creditors** of the Kake Packing Company similarly situated.

(2) It is then alleged that the Kake Trading and Packing Company was on April 9, 1915, adjudged a bankrupt, and the appellee was appointed Trustee and qualified as such.

(3) It is then alleged that on August 27, 1915, (the date is important), at Juneau, Alaska, a judgment was rendered in the sum of \$10,333.31, with interest at the rate of 8 per cent. per annum from the

31st day of January, 1915, in a certain action therein brought by the appellee against the Kake Packing Company, and that on August 31, 1915, an execution was issued on such judgment and returned unsatisfied.

(4) It is then alleged that on May 12, 1914, the Kake Packing Company was wrongfully, unlawfully and fraudulently dominated and controlled by the Sanborn-Cutting Co., and being so dominated, it wrongfully, unlawfully and fraudulently, and with intent to hinder, delay and defraud the creditors of Trading and Packing Co., and to defraud the Kake Trading and Packing Company, conveyed to the Sanborn-Cutting Co. the real and personal property involved in this suit, being the entire assets of the Kake Packing Co.

(5) It is further alleged that although the conveyance purports to have been made for the alleged consideration of \$72,621.01, in truth and in fact, the appellant was not a bona fide purchaser, and did not pay a valuable, or any, consideration for the property assigned, but, on the contrary, it took the property with full notice and knowledge and with fraudulent intent and purpose from the Kake Packing Co., and with intent to defraud the creditors thereof.

(6) It is further alleged that Sanborn and Kendall, of the directors of the Kake Packing Co., were also directors of the Sanborn-Cutting Co.

Although the prayer of the complaint does not really correspond with the allegations of the com-

plaint, the effect thereof is substantially that the appellant Sanborn-Cutting Co. be required to pay the judgment, and in case of failure to do so, the appellee have judgment against the Sanborn-Cutting Co., Gordon, Sanborn and Kendall, for the amount thereof.

To this complaint the Sanborn-Cutting Co. interposed an answer, by which it denied all the acts of fraud charged against it, and alleged:

(1) That it purchased the assets of the Kake Packing Co. in good faith and for a valuable consideration, and that the consideration thereof was that it should pay and satisfy all of the indebtedness of the Kake Packing Co., excepting a claim that the Kake Trading and Packing Company had against it, which it represented to amount to \$8582.21, and that the Kake Trading and Packing Company being one of the creditors of the Kake Packing Co. agreed to this arrangement and had assigned its claim to Sanborn and Kendall. That the property assigned to appellant was not worth to exceed \$60,000.00, but that it agreed to take the property over and to pay all the debts, which at that time were represented to aggregate the sum of \$71,621.01, exclusive of the claim of the Kake Trading and Packing Company. That the Kake Trading and Packing Company induced the Sanborn-Cutting Co. to take over the assets of the Packing Co., and the main inducement for the purchase was the cancellation of the claim of the Trading Company against the Packing Co., or

rather the assignment thereof to Sanborn and Kendall, who agreed to satisfy it and which they subsequently did. That the transfer was made on May 11, 1914, and immediate possession was taken, and that appellant had been in possession ever since. The history of the transaction is fully set forth in the answer.

(2) The appellant further alleged that the judgment set forth in the complaint was fraudulent and void, in that it was based upon the claim of the Kake Trading and Packing Company which had been theretofore assigned to Sanborn and Kendall by the Kake Trading and Packing Company on January 6, 1914, and was not owned by the Trading Company at the time, and did not pass by the proceedings in bankruptcy.

(3) It is then alleged that the appellee was wrongfully claiming to have an interest in the property assigned to it, thereby creating a cloud upon said property in the appellant.

(4) It is further alleged that Kirberger was the owner of all of the stock in the Trading Company and had full power and authority to transfer the account above mentioned.

At the trial of the case it was agreed that the two causes of suit should be consolidated, but that the pleadings should remain the same and considered as filed in the Court below, and that the allegations of both of the complaints should be tried the same as

if both suits had been instituted in the Court below, and neither party to take advantage of the informal manner in which the case should be tried.

It will be observed that the case in the Alaska suit is based entirely upon a judgment obtained by the appellee against the Kake Packing Co., and it is in the nature of a creditor's suit, and in order to sustain the suit, under the practice in Oregon and in other states as well, it was incumbent upon the appellee to clearly establish his judgment. If the judgment fails, his suit must necessarily fail.

Now, it will be one of our contentions that the judgment was void as to this appellant.

It is admitted in the pleadings in the case that this claim upon which the Alaska suit was based had been, long prior to the time the action was instituted, and long prior to the time the judgment was entered, assigned to F. P. Kendall and Geo. W. Sanborn, and the actual assignment is admitted to have been made by the Kake Packing and Trading Company, and it is admitted that the assignment was in writing and properly executed. (Pg. 87, abstract). But the contention is made that it was fraudulent—not void, but fraudulent—in that, first, it was without any consideration, and, second, that Kirberger, who was the President and General Manager and owner of all of the stock in the corporation, did not have power or authority to make the assignment. The Court below held that Kirberger, who was the General Manager of the corporation, and its Presi-

dent, and, in fact, its entire controlling force, and who was the owner of all of the stock of the corporation, and who had for many years prior thereto transacted all of the business of the corporation without any meeting of the directors or stockholders thereof, did not have authority to assign this claim of the Trading Company against the Packing Company, and, consequently, because of the fact that F. P. Kendall and Geo. W. Sanborn were stockholders and directors of the appellant and stockholders of the Kake Packing Co., as to the claim of the Trading Company, the transfer was, as a matter of law, invalid.

The Court below held that there was no consideration for the transfer, and that it was not made with the authority of the directors of that company. The Court below, evidently, overlooked the controlling decision in its jurisdiction on this point, namely, *Pacific State Bank v. Coats*, 205 Fed. 621.

The evidence covers a wide range, yet there is practically no controversy as to the material facts. Indeed, we believe there is no dispute as to any material fact in this case. As we read the record, the material facts are substantially as follows:

FIRST: That the Kake Trading and Packing Company, which we have heretofore and will hereafter refer to as the Trading Company, is a Washington corporation. It was incorporated and organized under the laws of Washington during the year 1904, with a capital stock of \$25,000.00, divided into

25,000 shares, of the par value of \$1.00 per share. At its organization Ernest Kirberger subscribed for one share; one F. C. Sepp also subscribed for one share, and E. B. Burwell subscribed for the remaining shares, namely, 24,998, and paid for the same by transferring to such corporation, among other things, a portion of the property which such corporation subsequently conveyed to the Kake Packing Co. hereinbefore mentioned. Burwell in fact owned all the stock in the Trading Company, the stock in the name of Sepp and Kirberger being subscribed and held by them for him. Upon the organization of such corporation, it opened up and conducted a general merchandising business at Kake, Alaska, also engaged in the business of salting, mild curing salmon and dealing in furs. Sepp and Kirberger being clerks therein, employed by the corporation.

Subsequently, but long prior to 1912, (pg 6, abstract) Kirberger acquired all the stock in the Trading Company and became sole owner thereof, and personally took charge of and transacted all the business, which consisted of the operation of a general mercantile store and business connected therewith at Kake, Alaska, and salting and mild curing fish and dealing in furs. No attention was paid to the stockholders or directors. In fact, no meeting of either took place between February, 1912, and the latter part of the year 1915. The latter meeting was held for the purpose of providing for proceedings in bankruptcy. Whilst Kirberger was the owner of the Trading Company and operating it in Alaska, he

conceived the idea of securing the construction of a salmon cannery plant there. He took up the proposition of securing one, and after many unsuccessful attempts, he finally became acquainted with defendants Sanborn and Kendall, which resulted in the organization of the Oregon corporation by the name of Kake Packing Co.

The Kake Packing Co., which we have hereinbefore and will hereafter refer to as the Packing Co., as distinguished from the Kake Trading and Packing Company, was incorporated and organized under the laws of the state of Oregon on February 19, 1912.

The incorporators of this corporation were Ernest Kirberger, S. S. Gordon, F. P. Kendall and Geo. W. Sanborn, with a capital stock of \$50,000.00, divided into 500 shares, of the par value of \$100.00 each. Ernest Kirberger subscribed for 125 shares, which he paid for in the following manner: \$8500.00 thereof by delivering to the Kake Packing Co. a deed executed by the Kake Trading and Packing Company for a tract of land which had been theretofore conveyed to the Trading Company by E. B. Burwell in part payment for his subscription for 24,998 shares of stock which he subscribed for in such corporation. The balance of such stock subscribed, namely, \$4000.00, was paid as follows: After the organization of the Packing Co., it constructed a cannery at Kake, Alaska, near the general merchandising store belonging to the Trading Com-

pany, on the ground the Trading Company had conveyed to it as aforesaid. This cannery was built prior to the fishing season of the year 1912. During its operation, it purchased from the Trading Company supplies, aggregating \$4000.00. The Packing Co. then executed and delivered to the Trading Company its check for \$4000.00. Kirberger utilized this check of \$4000.00 in payment of his stock subscription in the Packing Co.

S. S. Gordon subscribed and paid cash for 60 shares; Geo. W. Sanborn subscribed and paid cash for 85 shares; F. P. Kendall subscribed and paid cash for 85 shares; A. C. Kirberger, a brother of Ernest Kirberger, subscribed and paid cash for 60 shares; F. H. Sanborn subscribed and paid cash for 10 shares; and G. C. Fulton subscribed and paid cash for 20 shares.

The undisputed evidence shows that the corporation was organized in perfect good faith, in the ordinary course of business, and no advantage was taken of any one, much less attempted.

As we have stated, a salmon cannery was constructed by the Packing Co. early in the year 1912, but prior to the fishing season for that year, and the cannery was operated during that year by Ernest Kirberger. He was the only officer residing in Alaska, and his general merchandising store was very close to the salmon cannery. The other subscribers, with the exception of A. C. Kirberger, resided at Astoria, Oregon. During the year 1912,

the cannery was operated at a loss. During the salmon fishing season for the year 1913, the cannery was again operated by Ernest Kirberger, and, at the end of the season, it was discovered that the books showed an indebtedness of the Packing Co. in the sum of \$72,621.01, exclusive of an indebtedness to the Trading Company represented to be \$8582.21, making its total indebtedness, as shown by the books, of \$89,759.34.

The assets of the Packing Co. at that time were not to exceed in value \$60,000.00, and were consequently insufficient to satisfy the indebtedness.

The evidence also shows, without any contradiction, that practically all of the indebtedness of the Packing Co. was guaranteed by either Kendall or Sanborn, or both, with the exception of the amount due the Trading Company.

During this time, the officers of the corporation were Ernest Kirberger, President; F. P. Kendall, Vice-President; and Geo. W. Sanborn, Secretary. The directors were Ernest Kirberger, F. P. Kendall, Geo. W. Sanborn, S. S. Gordon and G. C. Fulton. S. S. Gordon went off the Board of Directors after the first of January, 1913, and took no part whatever in subsequent transactions of the corporation. The stockholders remained unchanged.

On January 6, 1914, at the request of Ernest Kirberger, an agreement was entered into between himself on the one part, and Sanborn and Kendall on the other, whereby it was agreed that Sanborn and

Kendall, and they did actually, give Kirberger an option to purchase all of the stock of the Packing Co. owned by Gordon, Kendall the two Sanborns and Fulton, at the agreed price of \$65,000.00, with an agreement on the part of Sanborn and Kendall that with the \$65,000.00 they would pay the entire indebtedness of the corporation, excepting the amount due the Trading Company, namely, \$8582.-21, and in consideration of Kendall and Sanborn paying the entire indebtedness with this \$65,000.00, Kirberger, on behalf of the Trading Company, agreed to assign and transfer to Sanborn and Kendall the claim of said Trading Company against the Packing Co. in the said sum above mentioned. This would leave Kirberger the owner of the entire corporation, with the indebtedness entirely satisfied. The agreement further provided that if Kirberger failed to pay this \$65,000.00 within the time limited, Sanborn and Kendall would become owners of the 125 shares of the Packing Co. then owned by Ernest Kirberger, and that Ernest Kirberger would have assigned to them the 60 shares of the capital stock of the Packing Co. then owned by his brother, A. C. Kirberger, and would also have the Trading Company assign to Kendall and Sanborn the \$8582.21 claim of the Trading Company against the Packing Co., in consideration of which Sanborn and Kendall agreed to satisfy and discharge all of the indebtedness of the corporation.

Kirberger failed to accomplish the sale of the cannery to his eastern friends. The result was that a special meeting of the stockholders of the Packing Co. was held at its office on May 11, 1914. At this meeting, it was mutually agreed between all of the stockholders that the entire assets of the Packing Co. should be sold to the Sanborn-Cutting Co., an Oregon corporation, in consideration of the Sanborn-Cutting Co. paying the entire indebtedness of the corporation, excepting the claim of the Trading Company, which had been assigned to Sanborn and Kendall and owned by them, it being the understanding that this claim should be delivered up to the Sanborn-Cutting Co. as fully paid and discharged. Accordingly, a special meeting of the stockholders was called for the purpose of providing for the sale of the assets of such corporation and held on May 11, 1914. All of the stockholders of such corporation were present, and a resolution was adopted authorizing the sale and directing the officers to make the necessary conveyances, which was accordingly done on that date. Ernest Kirberger representing the Trading Company, was present at such meeting, and voted the 125 shares in question in favor of the sale, and urged the sale, also waived payment of the claim of the Trading Company against the Packing Co. The appellant took immediate possession of the assets, and has been in possession ever since. It operated the cannery during the years 1914 and 1915. As a matter of fact, however, the indebtedness of the corporation, exclusive of the Trading

Company's claim, instead of being only \$72,621.01 aggregated the sum of \$81,177.18. This sum was paid by the Sanborn-Cutting Co.

The evidence also shows, without any substantial contradiction, and it was so found by the Court below, that the entire assets of the Packing Co., which were transferred to and received by the Sanborn Cutting Co., appellant herein, did not exceed \$60,000.00. Consequently, the appellant actually paid in cash a sum equal to \$21,177.18, in excess of the fair value of the property transferred to it.

The evidence also shows that the transfer was not in any manner tainted with fraud, but that it was an honest transaction. There is no testimony or evidence in the record showing, or tending to show, that Sanborn or Kendall, or the Sanborn-Cutting Co. had any notice or knowledge that the Trading Company was insolvent, or in anywise involved, but were under the impression that it was a solvent concern. It was actively engaged in business and continued so for practically a year thereafter.

The assignment of the claim of the Trading Company against the Packing Co. of \$8582.21 was made in January, 1914, and later ratified by the President and owner of the entire corporation on May 11, 1914, at the time of the actual transfer of the assets of the corporation to the appellant herein. It was further represented that the total indebtedness of the Packing Co. to the Trading Company was \$8582.21, and no more.

There was no meeting of the directors or stockholders of the Trading Company concerning such transaction. The appellant at that time being of the opinion that Kirberger being the owner of all of the stock in the corporation and general manager of the business of the corporation, who had exercised all the power and authority of the corporation for many years, had the power and authority to make this transfer, and did not deem it necessary that he should go through the farce of calling a meeting of the Board of Directors, consisting of himself and his two clerks, and solemnly adopting a resolution approving the action of the President, who actually owned all the stock. This would be like meeting with ones self. So such meeting was never called. But the transaction was never disaffirmed by the corporation until creditors of the Trading Co. got hold of Kirberger, who was, as it appears, an invertebrate, and induced him to disaffirm his acts.

The evidence shows that Sanborn nor Kendall, had knowledge as to the manner in which the stock in the Packing Co. was paid. They knew that Kirberger controlled and conducted the affairs of the Trading Company as if it were practically and peculiarly his business and that it was owned exclusively by him, and it was a-going concern and reputed to be entirely solvent.

The evidence also shows that on **April 9, 1915**, the Trading Company filed its petition to be adjudicated a bankrupt in the District Court of the

United States, for the District of Alaska, Division No. 1, at Juneau, and subsequently, and on May 8, 1915, it was duly adjudged a bankrupt and the appellee herein was appointed Trustee in Bankruptcy, and he duly qualified as such.

It will be observed that the Trading Company was not adjudged a bankrupt until practically one year after the transfer of the assets of the corporation to the appellant complained of herein.

The evidence also shows that on August 25, 1915, one year and two months after the transfer of the assets of the Packing Co. to the appellant, the appellee, as Trustee in Bankruptcy of the Trading Company, obtained the judgment against the Packing Co., in the District Court of the United States, for the District of Alaska, in the sum of \$10,333.31, and that execution has been issued upon such judgment and returned unsatisfied.

It is an admitted fact in this case that the claim sued upon in that case is the same claim that the Trading Company assigned to Sanborn and Kendall, namely, the claim of \$8582.21. Included in which, however, was the additional claim of \$1750.00, which was in the \$8582.21, the entire claim having been assigned. But, as stipulated by counsel for appellee, pg. 295, abstract—"Yes, we admit, the identical claim as far as we know represented by the assignment put in evidence this morning."

There was no evidence showing, or tending to show, that a single creditor of the Kake Trading

and Packing Company at any time filed, or presented for filing, either with the Referee or Trustee in Bankruptcy of such corporation any claim of any kind against such corporation, nor was there any evidence showing, or tending to show, that the assets of the Trading Company were insufficient to pay in full the claims filed. Indeed, this was impossible, for the reason no claim of any kind was filed.

It shall be one of our contentions that before a Trustee in Bankruptcy can maintain a suit to avoid a transfer of property by the bankrupt, it must be at least proved that the assets of such estate are insufficient to satisfy the claims filed.

This cause was tried before Honorable Robert S. Bean, District Judge, resulting in a decree in favor of the appellee and against the appellant alone, for the sum of \$6688.87, with interest thereon from the 12th day of May, 1914, until paid, neither party to recover costs. The suit was dismissed as to Sanborn, Kendall and Gordon. From this decree, Sanborn-Cutting Co. prosecuted an appeal to this Court.

The Court below held—

FIRST: That there was no evidence of fraud on the part of either the appellant, Kirberger, Sanborn, Kendall or Gordon. On the contrary, explicitly found and decreed that the entire transactions complained of were entered into and carried on and completed in the utmost good faith. This holding, of course, we do not question.

SECOND: That at the time of the assignment by the Trading Company to Sanborn and Kendall of its claim against the Packing Co., the Trading Company was **practically** insolvent, or, at least, was made so by the assignment. This we claim was error.

THIRD: That the attempted assignment of the claim of the Trading Company against the Packing Co. was without consideration and was, therefore, void, as a matter of law, as to the Trustee in Bankruptcy, although he may represent only creditors who have become such after the date of the assignment. This we claim was error.

FOURTH: That Kirberger, although the President and General Manager and owner of all the stock of the Trading Company, did not have power or authority to assign the claim of the Trading Company against the Packing Co., without authority from the Board of Trustees of the Trading Company, and that such authority could be obtained only at a meeting of such Trustees, and that no such meeting was ever held. This we claim was error.

FIFTH: That the transfer by the Packing Co. to appellant of the assets of such corporation was, as to the Trading Company, void, because of the fact such corporation was insolvent, and could not transfer its assets unless the entire indebtedness were paid, or the assets applied ratably to the indebtedness of such corporation, and that the consent of the Trading Company to such transfer and the waiver

by such company of its claim against the Packing Co. was void, and it was not estopped thereby to claim a participation in such assets. This we claim was error.

SIXTH: The Court further found that the indebtedness of the Packing Co. to the Trading Company, at the time of the transfer, was \$10,333.31 instead of \$8582.21. This we claim was error.

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SEVENTH: The Court awarded judgment against appellant and in favor of appellee in the sum of \$6688.87. This we claim was error.

EIGHTH: The Court allowed appellee interest on the amount found due, from May 12, 1914, until paid. This we claim was error.

NINTH: The Court below also held that the appellee could maintain this suit, even though there was no evidence showing or tending to show, that a single creditor of the Packing Co. had at any time presented or filed his claim against the estate of the bankrupt. This we claim was error.

TENTH: The Court below also held that the appellee could maintain this suit without proof that the assets of the Packing Co. were insufficient to satisfy the claims filed against the estate of the bankrupt. This we claim was error.

The following are the Assignments of Error upon which appellant expects to rely, which include the errors above mentioned, namely:

I.

That the Court erred in holding and adjudging and in entering a decree that the assignment by Ernest Kirberger to the defendants F. P. Kendall and George W. Sanborn of the account of \$8582.21 due the Kake Trading & Packing Co., a corporation, from the defendant Kake Packing Co., a corporation, was null and void, and in adjudging and entering a decree setting aside such assignment, and in holding the same for naught.

II.

The Court erred in holding and adjudging and in entering a decree that the defendant Sanborn-Cutting Co. did receive the assets and property transferred to it by the Kake Packing Co., a corporation, subject to the indebtedness of said Kake Packing Co., amounting to \$10,333.31, owing by said Kake Packing Co. to the Kake Trading & Packing Co., and in adjudging and decreeing that the defendant Sanborn-Cutting Co. received said assets and property as trustee for the benefit of the defendant Kake Packing Co., and in adjudging

and decreeing that plaintiff, as Trustee in bankruptcy, succeeded to the rights of the Kake Trading & Packing Co., a corporation, as creditor of said Kake Packing Co., and in adjudging and decreeing that plaintiff is entitled to a pro rata share, or any share, of such property and assets, and in adjudging and decreeing that plaintiff was entitled to any part or portion thereof, and in holding, adjudging and decreeing that the defendant Sanborn-Cutting Co. received such assets for the use and benefit of the plaintiff, or any person whomsoever.

III.

The Court erred in holding and adjudging that the plaintiff was entitled to recover from the defendant Sanborn-Cutting Co. the sum of \$6688.87, together with interest thereon at the rate of 6 per cent. per annum from May 12, 1914, and entering a decree to that effect, and in further adjudging and decreeing that plaintiff have and recover from the defendant Sanborn-Cutting Co. its costs and disbursements of such suit.

IV.

The Court erred in entering judgment and decree against the defendant Sanborn-Cutting Co. in the sum of \$6688.87, or any sum or amount whatever.

V.

The Court erred in entering judgment against the defendant Sanborn-Cutting Co. for interest on the sum of \$6688.87 from May 12, 1914, or from any date whatever, or any interest whatever.

VI.

The Court erred in failing, refusing to, and in not holding and adjudging and decreeing that the transfer and assignment of the assets of the Kake Packing Co. to the defendant Sanborn-Cutting Co. was lawful and was in good faith, and was for a valuable consideration and that the plaintiff had no interest therein or thereto, and that such transfer and assignment vested in the defendant Sanborn-Cutting Co. the title to said property, and divested the plaintiff of all claim, trust, or interest therein.

VII.

Th Court erred in failing, refusing to, and in not holding, adjudging and decreeing that the plaintiff was estopped from contending, alleging or claiming that he, as trustee, was entitled to question or set aside the assignment and transfer of the Kake Packing Co. to defendant Sanborn-Cutting Co.

VIII.

The Court erred in failing, refusing to, and in not holding that the acts of Ernest Kirberger, owner of all of the stock of the Kake Packing Co., were the acts and deeds of the Kake Packing Co., and binding upon such company.

IX.

The Court erred in holding, adjudging and decreeing that plaintiff was entitled to recover any judgment or decree in this case.

X.

The Court erred in not holding, adjudging, and in not entering a decree to the effect that the sale and transfer of the assets of the Kake Packing Co. to the defendant Sanborn-Cutting Co. was free from fraud, and was fairly and honestly made, and made for a valuable consideration, and that the said Sanborn-Cutting Co. is and was, since May 12, 1914, the owner of the whole thereof, and in not adjudging and decreeing that the plaintiff herein never at any time had any right, title, interest or estate therein or thereto, and in enjoining and restraining plaintiff from claiming to own any right, title, interest or estate of, in or to, or lien upon, or right to participate in, the assets of the Kake Packing Co., which

were on May 12, 1914, assigned and conveyed to this defendant, Sanborn-Cutting Co.

XI.

The Court erred in not entering a decree in favor of defendant Sanborn-Cutting Co. and against the plaintiff.

XII.

The Court erred in admitting in evidence over the objection of the defendant Sanborn-Cutting Co., and in not excluding from the evidence, Plaintiff's Exhibit "67a," being statement of the liabilities of the Kake Trading & Packing Co.

XIII.

The Court erred in not sustaining, and in overruling and denying, the motion of the defendant Sanborn-Cutting Co. to strike out all of Plaintiff's Exhibits "R," "S," "T," "U," "V," "W," "X," "Y," "Z," "AA," "BB," "CC," "DD," "EE," "FF," "GG," and "HH," and in receiving the same in evidence in said cause.

POINTS AND AUTHORITIES

I.

It is well settled that a Trustee in Bankruptcy does not take the property of the bankrupt as a bona fide holder for value, but as the bankrupt held it, namely, subject to all the valid claims, liens and equities.

Zarلمان v. First. Nat. Bank, 216 U. S.
134; 30 Sup. Ct. 368.

And the validity of such claims, liens and equities is to be determined in the absence of Federal statutes by the local law, as evidenced by the decisions of the State Courts.

Thompson v. Fairbanks, 196 U. S. 516;
25 Sup. Ct. 306.

Knapp v. Milwaukee Trust Co., 216 U.
S. 545; 30 Sup. Ct. 412.

II.

In order to maintain this suit, it was incumbent upon the appellee to have proven that the Estate of Kake Trading and Packing Company had not sufficient assets to satisfy the claims filed against such estate.

Mueller v. Bruss, 112 Wis. 406; 88 N.
W. 229.

There is no evidence in the record showing, or tending to show, that a single claim had been filed

against the said Kake Trading Company, with the Referee or Trustee.

III.

The Federal Courts accept the construction of state statutes by the Courts of the state, as to all conveyances made in such state.

Peters v. Pain, 133 U. S. 670; 10 Sup.
Ct. Rep. 354.

IV.

In Oregon, the rule is that in order to enable a creditor to maintain a suit to set aside a conveyance by his debtor as fraudulent, he must show an unsatisfied judgment or attachment upon a cause of action existing at the time of the conveyance, or a cause of action arising subsequent thereto, in which latter case, the conveyance must be shown to have been made with the express intention of defrauding subsequent creditors. No such evidence appears in this case.

Seed v. Jennings, 47 Or. 464.

Dawson v. Coffey, 12 Or. 513.

V.

It is well settled that the President, or other general officer of a corporation, has power prima facie to do any act which the officers of the corporation could authorize or ratify, and the burden of proof that such officer did not have such power in any given matter is upon the party denying the same.

Sun Printing Association v. Moore, 183

U. S. 642; 22 U. S. Rep. 240-244.

VI.

The record shows that every stockholder of the Kake Packing Co. voted in favor of the transfer of its assets to Sanborn-Cutting Co., including Ernest Kirberger, in whose name the 125 shares of stock were issued and held, and that the sale was for a consideration in excess of the value of such assets. Hence, the appellee cannot question the validity of such sale.

2 Thompson on Corporations (2nd ed.)
§1981.

7 Thompson on Corporations (3rd ed.)
§8045.

VII.

While it is true where one corporation sells its entire assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and evidence of fraudulent intent or want of consideration is not necessary. The purchasing corporation takes such assets with notice of such claims, and subject to such equitable liens. This is the rule in Oregon as laid down in *Williams v. Commercial National Bank*, 49 Or. 492-498.

But a creditor of the selling corporation can either by express conduct or act waive his lien and right to subject such assets to the satisfaction of his

claim. It is the contention of appellant that the Trading Company both by contract for a valuable consideration and by its acts waived payment of its claim, and is also by its express contract and acts estopped from enforcing its claim against either appellant or the Packing Co.'s assets.

5 Elliott on Contracts, §4175.

Boisot on Mechanics Liens, §705.

Pokegama etc. Co. v. Klamath etc. Co.,
96 Fed., 34, 35.

4 Words and Phrases (2nd ed.) pg. 1222.

8 Words and Phrases Judicially Defined,
pg. 7375.

40 Cyc 252.

Marine Iron Works v. Weiss, 78 C. C. A.
279; 148 Fed. 145.

Swain v. Seamans, 9 Wall. 274; 19 L.
Ed. 554.

There is a distinction between a waiver and an estoppel clearly recognized by the Supreme Court of Oregon.

Ward v. Queen City Ins. Co., 69. Or.
347, 353.

19 Cyc 793.

5 Elliott on Contracts, *supra*.

40 Cyc 252.

VIII.

The appellee could not recover interest on his claim under the laws of Oregon.

Sargent v. American State Bank, Or. 16.

Richardson v. Investment Co., 66 Or.
353, 358.

IX.

The evidence in this case shows, without contradiction, that Ernest Kirberger was the owner of all the stock of the Trading Company and was its President and General Manager, and had been such for many years, and conducted, managed and operated the business without consultation with any one, and no meeting of either the stockholders or directors was held for several years. Under such circumstances, the acts of Mr. Kirberger, as a matter of law, would be the acts of the corporation in all matters in which the corporation was interested.

McElroy v. Minn. P. H. Co., 96 Wis. 317;
71 N. W. 652.

Pacific State Bank v. Coats, 205 Fed.
618-620.

7 Thompson on Corporations, §8043-5.
Sun Printing Assn. v. Moore, *supra*.

X.

The Kake Trading and Packing Company having represented to the appellant that the total amount of its claim was \$8582.21, the extent of

appellants liability, under any aspect of the case, would be 66 2-3 per cent. of that sum.

XI.

Constructive fraud will not support a suit by subsequent creditors to set aside conveyances. As to them the fraud must have been specific and actual.

Leavengood v. McGee, 50 Or. 233.

ARGUMENT

I.

We have assigned numerous errors. These we believe can be discussed without taking them up in the order in which they are stated, but a discussion of the few propositions presented by this appeal will better aid the Court in arriving at a conclusion than to pick up the various assignments and then discuss each one.

THE OREGON CASE

Under this head, we desire to discuss the suit originally instituted in the Court below, that is, the suit brought by the appellee against the appellant, F. P. Kendall, George W. Sanborn, S. S. Gordon and the Kake Packing Company. This suit is instituted by a stockholder. The only theory upon which the suit is based is, that the Trading Company, of which appellee is the Trustee in Bankruptcy, was the owner of stock in the Packing Co., and that the Packing Co., through its stockholders and officers, made a

wrongful and fraudulent transfer of the assets to the appellant.

The record shows, if the contention of the appellee is correct, namely, that the 125 shares of stock of the Packing Co. in the name of Ernest Kirberger was in fact the property of the Trading Company, that Kirberger unquestionably was the general agent of the Trading Company, and the Trading Company would be bound by his acts.

Now, the record shows, without any question, that the sale complained of was authorized at a stockholders' meeting of the Packing Co. expressly called for such purpose, and that Kirberger was present at such meeting; that he was the President of the corporation and the presiding officer at the meeting of the stockholders, as well as directors; that he urged the sale and transfer; that he voted in favor of the sale and transfer; and that he executed the conveyance which accomplished the transfer, and used his influence to accomplish the sale.

The principle is too well settled to require argument that the Trading Company cannot, under this state of facts, call in question the acts of the corporation complained of.

Professor Thompson, Section 1981, Volume 2, lays down the doctrine as follows:

“The stockholders of a corporation may not question acts of the corporation taken with their knowledge and consent.

It does not lie in the mouth of the stockholders to object to what the company has done, if the act which he complains of was taken with his knowledge and consent. He cannot be heard to complain that he has been injured by the doing of something which he knew of at the time and expressly consented to."

It is, perhaps, true that had Kirberger been guilty of fraud in the transaction, and that such fraud was contributed to by the appellant, the Trading Company might be relieved and might be able to call in question the fraudulent acts of its agent. There was absolutely no evidence in the case in this regard. The eminent jurist who tried this case in the Court below expressly so found. An examination of the opinion filed in the case demonstrates this contention. We quote from the part of the opinion of the Court in this regard, pg. 152, abstract, as follows:

"The pleadings abound in charges of fraud and misconduct on the part of defendants Sanborn and Kendall, but such charges are not sustained by the testimony. The evidence shows quite clearly that there was no actual fraud or moral turpitude in any of the transactions involved in this suit, but that all parties concerned, including Kirberger, acted in the utmost good faith and with no intention to wrong anyone.

The only question is the legal effect of what they did."

Therefore, so far as the complaint of the appellee is concerned, originally filed in the Court below, it is out of this case, and needs no further consideration.

II.

THE ALASKA CASE

We refer to the suit instituted in the Alaska Court as the Alaska case, simply for the purpose of identification. This suit is based upon a judgment obtained by the Kake Trading and Packing Company against the Kake Packing Co., and an execution returned unsatisfied. It is, therefore, in the nature of a creditor's bill to set aside a fraudulent conveyance. The validity of the judgment gives the Court jurisdiction and unless this judgment is valid, this suit cannot prevail. The Trading Company, unless it has a valid judgment against the Packing Co., has no cause to complain of the acts of the Packing Co. It is only because it is a judgment creditor that it has any standing in Court, and, as we understand it, the rule of law pertaining to suits of this character is determined by the decisions of the state Courts. It is a familiar rule of law that a Court of Equity cannot give relief to a contract creditor in a suit brought by him to set aside conveyances in fraud of creditors. He must first arm himself with a judgment. This is fundamental. This rule is

announced in the case of Dawson v. Coffey, 12 Ore. 513. The appellant was not a party to the judgment in question. Therefore, it is at perfect liberty to deny its effect.

Now, the evidence in this case is clear that the claim upon which the judgment was based, at and long prior to the institution of the action and long prior to the entry of the judgment, had been, for a valuable consideration, assigned to F. P. Kendall and Geo. W. Sanborn, who claimed to own the claim. The assignment was executed by the President and General Manager of the Kake Trading and Packing Company, who had apparent authority to make the assignment. The assignment was unquestionably made in good faith, and it was made for a valuable consideration. Not only that, the Trustee in Bankruptcy was well advised of the fact of the assignment, and the date thereof. (pg. 87, abstract). This assignment was offered in evidence by the appellee at the trial of the case before the judgment was offered in evidence. We call the Court's attention to page 231, abstract of record, where Mr. Kirberger testified as follows:

“On the same day, there was an assignment made of the store account. This is the original document. I think it was prepared by Mr. Sanborn and signed by myself.”

The document was then offered and received in evidence as Plaintiff's Exhibit “61.” This assignment was not void on its face, and, in fact, was not

void under any circumstances or conditions. The pleadings on the part of the appellee do not show it to have been void. If we were to consider the appellee's allegations in that regard to be true, the assignment was merely fraudulent, but not void. Therefore, although the Trading Company may have been the equitable owner of the claim, it was not the legal owner, and, consequently, could not legally obtain a judgment thereon. The judgment would be as to appellant entirely void, for the reason that it dealt with the Trading Company upon the assurance on the part of the Trading Company that the assignment was valid, and had expended over \$81,000.00 upon the honest belief that the assignment was valid. Therefore, upon the appellee's own showing, the judgment was entirely void as to the appellant. If our position is correct in this regard, this surely ends this case. Before the appellee could prosecute an action to recover on this claim, it would have been necessary for it to have first set aside the assignment of this claim by a suit in equity, or by some proper proceedings. Not having done so, it did not have the title to claim, and the judgment in consequence is void. While the judgment is for the sum of \$10,333.31, and the assigned claim amounts to only \$8582.21, it was conceded at the trial of the case in the Court below that the judgment is the same claim assigned. This is the statement made by Mr. Robertson, attorney for appellee, page 295, appellant's abstract of record.

MR. ROBERTSON: Yes, we admit, the identical claim as far as I know represented by this assignment put in evidence this morning."

An examination of the record will show that the appellee attempted to prove the judgment by offering in evidence a certified copy of the journal entry of the Alaska Court. The appellant objected to the introduction of the instrument upon the ground that it did not show that the Court had jurisdiction. The judgment did not show that any complaint had been filed, or proceedings taken prior to the entry of this document. The objection was well taken. The complaint was not offered with the judgment entry, and, consequently, the judgment entry did not show what the judgment was for. In order to clear this matter up, a stipulation was entered into and some explanation was made in regard to the difference in the amount. The assignment, however, includes the entire claim of the Trading Company against the Packing Co. It was the intention to transfer the entire claim, and all parties so conceded it.

We, therefore, most respectfully submit that the record clearly shows that the judgment upon which appelle bases his cause of suit was as to appellant void.

III.

**ASSIGNMENT OF CLAIM OF
TRADING COMPANY TO SANBORN AND
KENDALL**

It is a conceded fact in this case that at the time the assets of the Packing Co. were transferred and assigned to the appellant, one of the considerations for such transfer was the assignment by the Trading Company to Sanborn and Kendall of the claim that the Trading Company had against the Packing Co. The appellant had agreed to satisfy and discharge all of the indebtedness of the Packing Co., excepting the claim of the Trading Company, and the evidence shows that appellant did this and paid, as we have stated, \$81,177.18. This assignment was made by the President and General Manager of the Trading Company. That it was made for a valuable consideration cannot be seriously questioned. Mr. Kirberger's explanation of this assignment is found at pages 231 to 235, appellant's abstract of record: Interrogated by Mr. Robertson:

(Q) Now, Mr. Kirberger, there is an assertion in this assignment: "In consideration of one dollar to me in hand paid, the receipt of which is hereby acknowledged, and other valuable considerations, I hereby sell, assign," etc. Will you kindly tell the Court what other consideration you got for signing that assignment, if anything?

To this question, counsel for defendants objected upon the ground that the same was immaterial, irrelevant and incompetent.

THE COURT: Let him state the circumstances under which made and we will determine.

(A) It was made for the purpose of going east and raising the funds to assist in operating the cannery the next year, or in other words assisting to finance the Kake Packing Company, from the fact that Mr. Sanborn and Mr. Kendall had already advanced and put up a good deal of money into the proposition, and it was my idea to do all in my power to assist them in getting money to put in and operate again, and I didn't wish to see the cannery go bankrupt or go into the hands of a receiver.

(Q) Why did you assign your store account of \$8582 to them?

(A) Because they gave me that instrument there, an option on their stock for the consideration of \$65,000. If I was to raise \$65,000, that would pay what Mr. Kendall and Mr. Sanborn had in the proposition and put the cannery on a good footing.

(Q) The original par value of the Kake Packing Company was \$100.00.

(A) Yes, sir.

(Q) And on this date you signed this assignment, providing that upon the payment of \$65,000, the defendants Kendall and Sanborn should assign and transfer to you, or to your order, 170 shares of the stock of the Kake Packing Company "now standing on the books of the company as follows:" Didn't you?

(A) Yes, sir.

(Q) In other words, under that assignment, you got an option to pay \$65,000 for 170 shares of the stock of the Kake Packing Company. Is that true?

(A) That is true, as far as stated there, yes, sir.

(Q) Well, now why did you make the assignment of your store account, amounting to \$8582.21?

(A) Because there was about ten thousand dollars of liabilities, outstanding, accounts, in addition to that, that the cannery owed the wholesalers and jobbers for lumber, etc., in addition, and they claimed that they would pay these bills, there themselves out of their pocket, if I would assign my store account; in order to enable me to go east and make that deal; to prevent others on the outside from interfering and jumping on the Kake Packing Company.

(Q) The defendants, Mr. Kendall and Mr. Sanborn, would pay the liabilities, certain liabilities of the Kake Packing Company, amounting to about ten thousand dollars?

(A) Yes, sir.

(Q) If you would assign to them—

(A) My store account.

(Q) The account of some eighty-five hundred dollars which the Kake Trading & Packing Company had against the Kake Packing Company?

(A) Yes, sir.

(Q) Did you receive any other consideration for making that assignment?

(A) None whatever, out side of I received a dollar on the account for the store. I received a dollar for that instrument and a dollar for the other one, I think.

(Q) You think they handed you a dollar a piece?

(A) Yes, they did.

(Q) Now, where did you say this was made?

(A) What date?

(Q) In whose office was it made?

(A) Mr. Sanborn's office.

(Q) In the presence of Mr. George W. Sanborn, Mr. Kendall and yourself?

(A) Yes, sir.

(Q) Anybody else present?

(A) Not to my knowledge.

(Q) Did you have an attorney present?

(A) No, sir.

(Q) Did you have advice of any attorney before signing the papers?

(A) No, sir.

MR. FULTON: Did Sanborn and Kendall?

(A) I couldn't say as to that, Mr. Fulton.

MR. FULTON: I don't thing anybody will contend that their lawyer drew that.

(Q) Now, do you mean, Mr. Kirberger, that an attempt—or that you were endeavoring to hold up the Canning Company by making this—by making these two assignments?

(A) Why I considered that it would be of great assistance to them as well as myself, and in making the deal east that I contemplated at the time.

(Q) Now, were you ever authorized in any way by the Kake Trading & Packing Company to make these assignments?

(A) No, sir.

MR. FULTON: I object to that as calling for his conclusions. What his authority was is a question of law.

THE COURT: That is perfectly clear; the records of the company will show whether he had any special authority, if that was necessary; and his position as general manager would determine whether he could do it as general manager.

On cross examination, Mr. Kirberger makes the following explanation concerning this assignment, to-wit:

(Q) Then you and Kendall and Gordon had a conference together?

(A) Yes, sir.

(Q) At the close of the 1913 season?

(A) Yes, sir.

(Q) Coming to the conclusion that the business was a failure?

(A) Yes, sir.

(Q) Sanborn personally—Sanborn & Son personally had advanced to the Kake Packing Company something like thirty-two or thirty-three thousand dollars of their own personal funds?

(A) Yes, sir.

- (Q) Sanborn himself and Kendall had endorsed the commercial paper of the Kake Packing Company to the amount of something over \$20,000?
- (A) Yes, sir.
- (Q) They stood then personally liable to pay something like—something over \$50,000?
- (A) Yes, sir.
- (Q) How much more—how much above that fifty thousand do you think Messrs. Sanborn and Kendall had obliged themselves to pay personally, jointly?
- (A) Personally—about ten thousand, nine hundred, something.
- (Q) So that made Kendall and Sanborn obligated to pay for the Kake Packing Company something like sixty thousand odd dollars?
- (A) Yes, sir.
- (Q) Legally obligated to pay?
- (A) Yes, sir.
- (Q) You realized that?
- (A) Yes, sir.
- (Q) Then what solution did you offer for that situation? You were the man that had managed it.

(A) Why, Mr. Kendall at first had been talking to me in regard to the condition and when we met—Mr. Sanborn and Mr. Kendall and I met on January 5th or 6th, at Astoria, we had started to talk over the condition and affairs of the Kake Packing Company.

(Q) Could you tell us about what month that was?

(A) Yes, sir, January 5th, 1914.

(Q) That was the first time that Mr. Sanborn was able to get around to transact business?

(A) Yes, sir.

(Q) Now, go on and state what occurred then.

(A) And in this meeting, as you have stated it was quite a disappointment on the part of Mr. Sanborn, and also Mr. Kendall in regard to the profits made for the year, and I could realize that as well as they two, and I figured if there was anything I could do in the shape of getting some of these people interested that I had originally figured on getting interested with me; I would try to do so and it had to be put out in some kind of a proposition and that led me to send the first telegram, after getting an option for eighty-five thousand, on the entire hold-

ings. That telegram I sent to my brother, and he wired back that he didn't think it was possible at that time to do anything, and I immediately wired to an attorney, which is a man that is of considerable means and a man that I had already met in Alaska, a couple of years ago on a trip, and who afterwards I made a very pleasant relation, friendly relation, and this man had been contemplating and anxious to get into the canning business, too, and also my cousin, Mr. Fred Morck, who operates in the oil business, back in Warren, Pennyslvania, and I sent him a telegram also, and they replied and said they would have to have something more definite in the shape—better write everything—write the proposition out in detail; they wanted full particulars. So I went to Mr. Sanborn again, and Mr. Kendall, and they drew up that option then.

(Q) This option then, was drawn up at your request?

(A) I don't know as my request; I couldn't say as to that, but we talked it over and that was the idea of Mr. Kendall, who put it in that form.

(Q) I understood you to say that in putting the proposition to your friends and persons whom you thought would help you out, they

wanted the thing in more definite shape, and therefore, you went to Kendall and Sanborn and told them this, and that resulted in this contract here of January 6, 1914, Plaintiff's Exhibit "59."

(A) Yes, sir, I am familiar with that.

(Q) So you entered into this contract. Now, the idea—this contract is a little bit hazy, but the idea of that contract was and your understanding of it was, Sanborn and Kendall would take this \$65,000 that you were to pay them and apply that upon the debts of the corporation—the Kake Packing Company, were they not?

(A) I don't know as I understand it just in that light. My understanding was that the \$65,000 was to simply deliver their stock to me, or to the people that I got.

(Q) They were to put the \$65,000 in their pockets?

(A) No, sir, it wouldn't be putting it in their pocket. It would be simply paying off the indebtedness, their own indebtedness; their own account there; it shows there on that statement.

(Q) That is—

(A) \$20,000 bills payable and ten thousand American Can Company and thirty-two thousand to Mr. Sanborn.

(Q) That is right; they were to take the money, though?

(A) Yes, sir.

(Q) And pay it—apply it on claims due from the Packing Company?

(A) Yes, sir.

(Q) In other words, this \$65,000 that was to be received from Sanborn and Kendall was to be applied upon the indebtedness of the Kake Packing Company?

(A) It certainly would be that fact.

(Q) And then they agreed not only to do that, but they agreed they would pay something like ten thousand dollars spot cash in addition to that, didn't they?

(A) Only if I surrendered my store account to them.

(Q) In case you suffered an equal loss with them?

(A) Yes, sir.

(Q) Then their proposition was that: If you bought from them, they would stand to lose the ten thousand—if you bought from them? That would be correct, wouldn't it? I don't want to—I am honest about this—as I understand it: If you bought from Sanborn and Kendall, paid them the \$65,000, they would put ten thousand dollars on top of that, consequently they would

lose ten thousand dollars if you bought from them?

(A) The understanding was that they were to pay these bills. Yes.

(Q) And ten thousand more than \$65,000?

(A) Yes, sir.

(Q) They would lose then their \$17,000 they originally subscribed and the ten thousand on top of that. That is correct, is it?

(A) It is correct, sir.

(Q) And you, on the other hand, in case they bought from you, or in case you didn't buy, you were to lose your eighty-five hundred, because they were obligated to pay this \$65,000 anyway?

(A) And my \$12,500 besides.

(Q) Yes. If you didn't buy from them, they had to put up about seventy-five—\$65,000; they would have to put up \$65,000; in that event you were to waive your \$8500?

(A) Yes, sir.

(Q) That was a fair deal, wasn't it?

(A) Yes, sir.

(Q) You considered that a square deal, wasn't?

(A) It was just as square—absolutely, it was all done in good faith, as far as I know.

(Q) I understand, and I don't want you to think, Mr. Kirberger, in my questions here that I am insinuating anything against you. I want to treat you just as I know how to treat anybody, and fairly too. But as I understand the contract, it was a mutual contract, it was a mutual contract between you; that no matter how it came out, no matter whether you bought or whether you didn't, one of you was bound to lose \$10,000?

(A) May I make a statement?

(A) Sure.

(Q) You understand, Mr. Fulton, that when the \$65,000 proposition was put up, this ten thousand nine hundred odd dollars there is in addition to Mr. Kendall and Mr. Sanborn's obligations to the company.

(Q) Yes.

(A) Now, this proposition, the way Mr. Sanborn put it up to me, and Mr. Kendall, that if I would make that assignment of the store account there, they would start in and pay these bills off, that was outstanding, outside the Kake Packing Company—the Kake Packing Company owing—to enable me to make this deal east, among my people, to prevent these other people, the creditors from jumping on the Kake Packing Company while I was absent.

(Q) Now, here is a letter that Mr. Sanborn wrote you on March 21, 1914, which somewhat clarifies and explains the situation, does it not?

(A) Yes, sir, I know the particulars of that letter.

(Q) And at the same time, you wrote another letter explaining the same situation?

(A) Yes, sir.

(Q) And that gives a pretty clear idea of what your understanding was then?

(A) Yes, sir, shows what I was trying to do.

(Q) You were doing your best I understand, to get out of a bad box. I don't recall that any of the stockholders got any money back, did they?

(A) No, sir.

Thereupon, counsel for defendants handed witness a letter.

(Q) That is your signature there?

(A) Yes, sir.

(Q) Now, who was Mr. Wallbridge?

(A) He was the attorney I was telling you about; an attorney in Hoopeston.

Thereupon, counsel for the defendants offered in evidence the documents just testified to, and the same were duly received and read in evidence, and

marked Defendants' Exhibit "E", and are hereunto attached and so marked, and made a part hereof.

(Q) This is a statement showing the assets and liabilities of the Kake Packing Company.

(A) That is correct to the best of my knowledge.

(Q) It shows assets to be \$76,300.65; liabilities \$72,621.01. Included in that are the Astoria Iron Works, American Can Company, \$10,507.65; bills payable \$20,359.84, etc. Now, I notice here, Mr. Kirberger, that you state that this \$8500 transferred to Sanborn & Kendall from my own and the Kake Trading & Packing Company account was made with the distinct understanding that this transfer is a legitimate transfer to them of this full amount. What do you say as to that transfer now?

(A) I am not going back on that letter; I am not going back on that letter at this stage of the game, you can bet on that.

(Q) I didn't think you would.

(Q) When you wrote that letter you told the truth?

(A) I am not going to deviate from the truth in any form, shape or manner.

(Q) That isn't the question?

(A) No, sir.

(Q) When you wrote that letter, you told the truth?

(A) Yes, I told the truth.

(Q) The whole truth?

(A) Yes, and nothing but the truth.

(Q) Nothing but the truth, and that transfer of that \$8500 was an absolutely honest, square, flat-footed deal between two men, as men, wasn't it?

(A) Yes, sir, there is no question in any form, shape or manner about the transfer, as far as any idea of fraud or anything like that.

(Q) You were two business men; met on open ground. You knew what you were doing, and you made, as far as you thought at that time a good business deal, didn't you?

(A) Yes, sir.

(Q) Now, the \$5000 was not paid by you?

(A) No, sir, it was not.

(Q) But you got the extension of time, just the same, didn't you?

(A) Got the extension.

(Q) And you went back east, didn't you?

(A) Before, yes; before that was given I came back. Extended after I returned from the east.

(Q) You returned from the east in March?

(A) May—no, March, that is right.

(Q) So you had been east and had come back?

(A) Yes, sir.

(Q) And the result of your telegram was that the parties didn't desire to take it?

(A) Well, they didn't—they haven't never come out like that. The parties kept hanging fire, hanging fire, and hanging fire, and they were anxious to get in, but they couldn't get in contact with their own people that were in Florida or California and it was a very hard winter there, and they just hung back, and hung back, although they were very anxious to come in, but on account of the financial condition, etc., they didn't come through as we anticipated at the time.

(Q) You know that Mr. Sanborn and Mr. Kendall were practically the owners of the Sanborn-Cutting Company, didn't you all the time?

(A) Well, I didn't know it definitely, Mr. Fulton, that they controlled the Sanborn-Cutting Company, but I knew that Mr. Kendall talked to me and said they contemplated making a deal with the Sanborn-Cutting Company to take over, but I don't know any more than that.

(Q) Well, you understood that Mr. Sanborn was president and general manager of the Sanborn-Cutting Company?

(A) Yes, I knew that.

(Q) And that Mr. Kendall was also interested in it?

(A) Yes.

(Q) They made no attempt to conceal that from you?

(A) Absolutely none.

(Q) And so when you were dealing with the Sanborn-Cutting Company in making this sale of the assets of the Kake Packing Company to the Sanborn-Cutting Company, you understood the full relation of Mr. Sanborn and Mr. Kendall not only to the Kake Packing Company, but to the Sanborn-Cutting Company?

(A) Yes, sir, I appreciated that.

(Q) You understood that thoroughly and no attempt was made to deceive you in any way?

(A) No, sir.

(Q) You understood that. Do you think you could have made a better deal than you did with the Sanborn-Cutting Company if you had been given further time?

(Q) Do you think you could have made a better deal if you had had further time?

(A) I might have, if I had had the whole summer to it, but I don't know whether then, on account of the war breaking out August 6th there, might have affected us again.

(Q) Then, of course, it would have been necessary in any event for Kendall and Sanborn to have dug up about seventy thousand dollars in order to have given you that time, wouldn't it? In order that you should have enjoyed the whole summer in which to secure a purchaser?

(A) Well, I don't know that they would have had to expend that immediately. Of course, they were obligated to that extent there, as shown there on that statement.

(Q) The creditors naturally wanted their money?

(A) Yes, sir.

(Q) I presume the creditors of the Kake Packing Company were no different from ordinary creditors; they wanted their money, didn't they?

(A) Yes, sir.

(Q) And in order to have given you the summer, it would have been necessary for Sanborn and Kendall to have carried this seventy thousand odd dollar indebtedness?

(A) Yes, sir.

(Q) You couldn't do it?

(A) No, sir, I couldn't.

(Q) So on May 11th, before the meeting of the directors of the Kake Packing Company, May 11, 1914, you and Mr. Sanborn had discussed the situation pretty fully, hadn't you?

(A) Before May 11th.

(Q) Yes.

(A) Yes, sir.

(Q) You came to the conclusion that something had to be done?

(A) Yes, sir.

(Q) You had done your best, your level best, to get somebody to buy that?

(A) Yes, sir.

(Q) Well, in either event, Sanborn and Kendall would have lost ten thousand dollars or you?

(A) Yes, sir.

(Q) Each of you offered to sacrifice ten thousand dollars outside of the money you already had in, and you couldn't get a purchaser; that is right, isn't it?

(A) I can put it this way, Mr. Fulton: That I was willing to make any kind of a sacrifice in order to save the company from going into bankruptcy.

- (Q) So were Sanborn and Kendall?
- (A) Yes, and that is the reason I made this sacrifice.
- (Q) You had a business reputation of your own to establish?
- (A) Yes, sir.
- (Q) So, when you met at the stockholders' meeting of May 11, 1914, you had practically made up your mind what you were going to do?
- (A) Yes, sir.
- (Q) What was your understanding about this 125 shares of stock that you signed over to Kendall and Sanborn? What was your idea about that? What was your understanding?
- (A) It was simply that when I went east, I was obliged to make that assignment there and turn over the stock to Mr. Sanborn and Mr. Kendall in order to get that deal—get that proposition to go east with.
- (Q) Oh, I see; you paid that for your option?
- (A) Well, I can't say that I went out and put it that way; no, I wouldn't say it that way, either.
- (Q) The Court here wants to know, and I want to know, too. We want to know what your idea is about it.

(A) Yes.

(Q) Now, you assigned Messrs. Sanborn and Kendall 125 shares of the capital stock of the Kake Packing Company?

(A) Yes, sir.

(Q) The assignment here says it is to be their property. Now, what was your idea about that; your contract is in; read it now. I may not understand it, but I would like to know what your views of this contract were.

(A) Well, the truth of the matter was, Mr. Fulton, so long as it was well enough to have that instrument, all right enough, but I trusted in Mr. Sanborn, and I trusted Mr. Kendall.

(Q) Yes, that was right, and they trusted you.

(A) And I never even went to an attorney for advice on that option.

(Q) No.

(A) Never had any interview with anybody else, any other business man, only Mr. Sanborn, Mr. Kendall, and myself.

(Q) Did they?

(A) I don't know, Mr. Fulton.

(Q) It was done in your presence there, wasn't it?

- (A) Yes, sir. No, they didn't have at that minute.
- (Q) Mr. Kendall you say wrote it?
- (A) Yes, I think he did; wrote it in lead pencil, first.
- (Q) Of course you have seen considerable of my writing; you know I didn't write that, don't you?
- (A) I know you didn't write it.
- (Q) No, sir, I dont think you did.
- (Q) It isn't my words there at all, or my language?
- (A) I understand you say I didn't have anything to do with it as far as you know.
- (A) As far as I know, Mr. Fulton. You didn't have anything to do with that that I know of. Mr. Kendall wrote it out first, and I was anxious to make any kind of a sacrifice to keep the company from going under, and show that I wanted to do what I thought was right in their eyes.
- (Q) That is right, but I wondered what you meant when you said that you didn't have the advice of an attorney.
- (A) I didn't have the advice of an attorney whether that proposition—the option is legal or whether it wasn't legal. I didn't know that.

(Q) That is what you meant?

(A) Yes, sir.

(Q) I didn't understand; I thought that is what it was. It says here: "Should said Ernest Kirberger and A. C. Kirberger fail to perform and carry out the terms of this agreement as herein specified on or before February 15th, 1914, then all their right, title and interest in and to the stock of the Kake Packing Company, now standing in their names upon the books of the company shall cease, and same shall revert to and become the personal property of the said F. P. Kendall and George W. Sanborn." Now, isn't this the fact, Mr. Kirberger: That if you failed to make this business deal the entire burden of paying the indebtedness of the Kake Packing Company would fall upon the shoulders of Mr. Sanborn and Mr. Kendall. That is a fact, isn't it?

(A) Yes, sir.

(Q) And your object was and their object was that if they did pay it they wanted to own the stock?

* * * * *

(Q) And the understanding at that time was that the claim of the Kake Trading and Packing Company should not be paid by the Sanborn-Cutting Company, wasn't it?

(A) It never entered in on anything—never was brought up again, Mr. Fulton. Never since January 6th, never was mentioned again in regard to any matters at all.

(Q) But it was not included?

(A) No, sir, was not included in that.

(Q) And was purposely omitted, was it not, from that statement?

(A) Couldn't help but be omitted after it was signed over.

(Q) I say was purposely omitted?

(A) Yes, sir.

(Q) And your understanding was clear and flat-footed that the Sanborn-Cutting Company was not to pay the Kake Trading and Packing Company any part of that \$8500, or anything it had against them?

(A) I never figured on anything that the Sanborn Cutting Company was to pay them; it never occurred to me at all.

(Q) Don't you know that was absolutely and thoroughly understood, that the Sanborn-Cutting Company was not to pay any sum of money whatever to the Kake Trading Company?

(A) It never was—it was never considered to pay anything that I know of.

(Q) I say, wasn't it understood that it was not? Wasn't that your understanding?

(A) It must have been my understanding according to the papers there; I can't go back on that.

(Q) I know, but wasn't it your understanding, Mr. Kirberger?

(A) Absolutely was my understanding as far as I know, that I couldn't come back after the account was assigned; I couldn't very well expect the Sanborn-Cutting Company to come back here and pay something that I had agreed to sign over.

(Q) I know, but suppose the assignment—I don't care about the technical proposition involved here, but am just talking about the proposition just man to man. The understanding was flat-footed and square-toed that the Sanborn-Cutting Company was not to pay the Kake Trading Company any part of this claim against the Kake Packing Company?

(Q) I know, but wasn't it your understanding, Mr. Kirberger, it was not to do so?

(A) The understanding was as far as I know, Mr. Fulton.

(Q) You were the only man that would know, outside of the Sanborn-Cutting Company, weren't you?

(A) Yes, sir.

(Q) Then what do you say about it, frankly, man to man?

(A) Why, I say just the same as I said there in the assignment; I assigned it over—or in the book there.

(Q) You never expected to get it back?

(Q) I say did you ever?

(A) I never did.

(Q) Never entered your head it was going to come back?

(A) I don't know whether there would be any consideration of the thing or not. In fact, I never figured anything else about it. After the thing was all over, I went up there and started to do the best I could.

(Q) And when these conveyances were executed, conveying the assets of the Kake Packing Company to the Sanborn-Cutting Company, you understood that the claim of the Kake Trading Company against the Kake Packing Company was not to be paid by the Sanborn-Cutting Company?

(A) Yes, I understood that.

(Q) You understood that?

(A) Yes, sir.

(Q) That is what I thought, and so did Messrs. Sanborn and Kendall understand it, and so did the Sanborn-Cutting Company through them—as you understand it; is that right?

(A) Yes, sir.

(Q) Now, there is a charge made here, Mr. Kirberger, in this complaint, that Kendall and Sanborn bulldozed you; that they made you sign a lot of documents down there against your will and against your consent. Is there truth in that at all?

MR. ROBERTSON: If the Court please, we think to call on Mr. Kirberger to answer the question in the direct form that way—it must be realized that while it is true Mr. Kirberger is here on our behalf, in a way that places the plaintiff to this suit to a disadvantage, because I have been compelled to bring Mr. Kirberger here; what Mr. Kirberger did at that time, as a matter of fact, is adverse to the plaintiff's interest at this time.

MR. FULTON: If counsel for plaintiff objects to the witness answering this question, I want it understood I will not have him answer it; if they object to having it in.

The testimony of Mr. Kirberger in the above regard was verified by the testimony of Mr. Geo. W. Sanborn, page 345, et seq., abstract. We do not deem it important to include Mr. Sanborn's testimony in this brief, for the simple reason that the testimony of Mr. Kirberger shows, beyond any question, that the assignment by him of the \$8582.21 account was for a valuable consideration, and was made in the utmost good faith by all parties concerned. Mr. Kirberger, as manager of the Trading Company, was of the honest opinion that by such assignment, the Trading Company would obtain a financial benefit and commercial advantage. This is, undoubtedly, a sufficient consideration for the transfer.

The evidence further shows that the transfer was based upon an actual consideration and a reasonable and fair consideration. The Wallbridge letter, above mentioned, Defendant's Exhibit "B", will undoubtedly, throw some light on the subject, and we incorporate it herein, to-wit:

"(Marked) Copy to Geo. W. Sanborn and Son.

March 21st, 1914.

Mr. John B. Wallbridge,
Hoopeston,
Illinois.

My Dear Mr. Wallbridge:

I arrived in Portland on Saturday night, the 14th, and have had a conference

with Kendall and Sanborn on Monday and Tuesday of this week, and since then have been in Astoria going over the books and statements and trying to get out a more comprehensive statement of assets and liabilities of the Kake Packing Co., as you seemed to not quite understand the proposition as put up to you.

In the first place, the item of about \$8,500 transferred to Sanborn and Kendall from my own and the Kake Trading and Packing Co., account, was made with the distinct understanding that this transfer **is a legitimate transfer to them of this full account, and this amount does not appear in the liabilities of the Kake Packing Company as it is not a liability now, having been charged off the books.** The consideration being that they gave me an option on the Kake Packing Company, while I could make my trip east, and also if I succeeded in making the deal, they were to deduct in assuming the liabilities, \$10,000. In other words, if we took the plant there was to be \$10,000 deducted from the total liabilities, which they were to assume and pay out of their own pockets; and which both they and I propose to stand by. To make it more clear to you I am enclosing you herewith statement of the assets and liabilities of the company. We have had to make a new

one, as quite a lot of the pickled and canned salmon has been sold and credited to this account since my leaving here. This leaves cashable assets of \$15,656.37. Of this there is 79 tierces of pickled salmon which will probably be sold shortly and go to the credit of the account. There is also 437 cases of canned salmon that will be sold; in fact, are sold now and waiting for shipment. The balance of the cashable assets are in Alaska and are just as good as cash, as if we operate they will all have to be used, and would have to be bought and paid for if we did not have them. The other assets, buildings, machinery, etc., are identical with the statement you have, with the exception that I find I left out really a cash item, which was Fire insurance, \$927.25. This is the amount paid for insurance in force, and which carries through a good part of the year and should be the same as any other asset. The item that I had in my old statement of \$5,937, insurance on Launch Kake, has been received and has gone to pay off part of the liabilities. You will notice that the liabilities have been decreased considerably, as Sanborn and Kendall have paid off quite a few of these accounts. You will also notice that the total liabilities amount to \$72,621.01. Sanborn and Kendall are willing to assume and pay for all of these liabilities;

we to pay them \$62,621.01, or a deduction of \$10,000. They are also willing, and agree, under letter today, to me, to give me further extension in order to make this deal, up to May 1st, providing I pay in to them \$5,000.00 between now and March 28th, said \$5,000, to apply on the purchase price of the plant. They agree to turn over to me all the stock of the corporation in their hands; That is, the Kendall stock, the Sanborn stock, the Gordon stock, the Fulton stock, and my stock, which I transferred to them, in fact all the stock with the exception of my Brother's.

Now I wish to impress upon your mind that if you wish to make the deal—and and I hope you do—that the \$5,000.00 must positively be paid immediately, otherwise there is no extension and they will have to take the plant, as time is getting late for operating, and if anything is to be done, either by ourselves or themselves, the matter must positively be settled at this time and papers exchanged not later than May 1st. Otherwise we would lose the season's business. In making this agreement with them I have positively taken it upon myself to turn over to them my Brother's stock of \$6,000, in addition to my own stock which I transferred before leaving here for the East, providing we do not take the plant.

If the \$5,000.00 is paid as above they agree to deposit in escrow in any one of the banks all the Kake Packing Co. stock as above to be turned over to us on payment of the balance of the \$62,621.01.

I desire to state that the outlook for the coming season in canned salmon and mild cured salmon is very good and a great deal better than when I was East. The Burnett Inlet Plant in which Mr. Sanborn is interested is going to operate and is preparing for 60,000 cases, salmon, and 500 tierces pickled salmon.

This is a mighty good proposition and I consider that we have a first class deal and I hope that you will do everything in your power to co-operate with Mr. Morck to pull this deal through. You will understand that I am willing to put all my holdings, store property and stock of merchandise in the new organization and take stock for same. I am sending a copy of this letter to Mr. Morck also statement so that you will both keep posted at the same time.

Upon receipt of this I wish you would wire me whether the proposition is accepted and the five thousand arranged for immediately.

Very truly yours,

(Signed) Ernest Kirberger."

We wish to call the Court's attention to the following in the above letter, namely:

"In the first place, the item of about \$8,500 transferred to Sanborn and Kendall from my own and the Kake Trading and Packing Company, account, was made with the distinct understanding that this transfer is a legitimate transfer to them of this full account, and this amount does not appear in the liabilities of the Kake Packing Company, as it is not a liability now, having been charged off the books."

This ought to settle all controversy as to what the assignment to Sanborn and Kendall included. It included the entire claim sued upon and upon which judgment was entered in the Alaska case, wherein the appellee was plaintiff, and the Kake Packing Co. was defendant, being the judgment upon which the appellee based his cause of suit.

It will be further observed, in the statement of the liabilities of the Kake Packing Co. made to Sanborn-Cutting Co., appellant, the claim of the Trading Company is conspicuous by its absence. Thus, by written assignment duly executed and delivered, by letter, and by statement of the liabilities of the Kake Packing Co., the claim of the Trading Company is shown to have been owned by Sanborn and Kendall, and not only that, the agreement was that no claim would be made against the purchaser of the assets of the Packing Co. by the Trading Company on such account.

We think, therefore, that we are clearly within the record when we state that the following propositions are clearly established by the evidence without any contradiction whatever, namely:

FIRST: That the assignment by the Trading Company to Sanborn and Kendall of the \$8582.21 claim of such company was had for a good and valuable and reasonable consideration, and was intended to include the entire claim of the Trading Company.

SECOND: That Kirberger, as President and General Manager of the Trading Company, and as owner of all of the stock thereof, and who had for years transacted all of the business of the Trading Company, had full power and authority to make this assignment. *Sun Printing Assn. vs. Moore*, 183 U. S. 642.

THIRD: That the assignment was made and accepted in absolute good faith, and was part of the consideration for the moving to the appellant of the assignment to it of the assets of the Packing Co. In other words, appellant would not have accepted the assignments of the assets, unless this claim had been transferred and cancelled, for it was well understood that this claim was not to be paid by the appellant. *Swain v. Seaman* 9 Wall. 274.

FOURTH: That even though it should be held that Kirberger did not have power or authority to assign the claim of the Trading Company, amounting to \$8582.21 to Sanborn and Kendall, yet the evidence clearly shows beyond any question that the Trading

Company consented to the assignment of the assets of the Packing Co. and consented that such assignment should be made without payment of its claim, and waived any equity or right that it had to enforce its claim against the Packing Co., or the appellant, and that, as a matter of law and equity, the Trading Company is estopped from enforcing its claim either in law or in equity against the appellant, or against the assets of the Packing Co.

These propositions seem to us to be so clearly established by the evidence as to require practically no further argument.

IV.

VALIDITY OF ASSIGNMENT OF THE CLAIM OF THE TRADING COMPANY TO SANBORN AND KENDALL

The Court below in its opinion held—

FIRST: That the evidence shows clearly that there was no actual fraud or moral turpitude in the transactions involved in the suit, and that all parties, including Kirberger, acted in the utmost good faith, with no intent to wrong **anyone**, and that the only question involved in the case was the legal effect of what they did.

SECOND: The Court then held that the assignment of January 6, 1914, not having been authorized by the Board of Directors, and without consideration, was, therefore, void as a matter of law as to the

Trustee in Bankruptcy, although he represented only creditors who had become such after the date of the assignment.

THIRD: That although the property of a private corporation is not chargeable with any specific lien in favor of the general creditors, so long as it is in the active exercise of its functions, if not restrained by charter or statute, it may exercise full dominion over its property as an individual over his. When, however, it becomes insolvent and does not expect to make any further effort to accomplish the object of its creation, it becomes the duty of its officers and managers to distribute its property or proceeds thereof ratably among all the creditors, having regard, of course, to valid liens or charges previously placed upon it. That the law will not permit them under such circumstances to obtain any advantage for themselves to the prejudice of other creditors.

FOURTH: The Court further held that because of the fact that the Packing Co. was insolvent and intended to cease business, and that because of the fact that Sanborn and Kendall were stockholders and directors in both the selling and purchasing companies, the Packing Co. could not within the law transfer the property of the Packing Co. to the appellant, upon the latter paying a part only of the indebtedness of the Company, especially since such indebtedness was largely due to them personally, or for which they were liable as endorsers or guarantors.

We respectfully submit that the lower Court overlooked entirely the true principles involved in the transaction complained of, and failed to appreciate the full force of its evidence, in the following particulars:

FIRST: The testimony and evidence, as we have stated, shows clearly that the assignment to Sanborn and Kendall of the claim of the Trading Company against the Packing Co. was made for a valuable consideration. This we have demonstrated from the testimony of Kirberger alone.

SECOND: The Court was clearly in error in holding that Kirberger, as President and General Manager of the Trading Company and owning all of its stock, could not make a valid transfer or assignment of its accounts against the Packing Co., unless such assignment was authorized by the Board of Directors. This doctrine is wholly at variance with the rule laid down by this Court in *Pacific State Bank v. Coats*, 205 Fed. 618-621. *Sun Printing Assn. v. Moore*, *supra*. This Court, in discussing the powers of a Washington corporation, the Trading Company being a Washington corporation, among other things quotes with approval the case of *Parker v. Hill*, 68 Wash. 134, 146; 122 Pac. 618-623, as follows:

“People dealing with corporate agencies have the right to rely upon the apparent authority of those in charge of the corporate business, and for acts done within the scope of that authority the corporation is bound.”

The doctrine, however, of the power of an officer of a corporation owning all the stock is there clearly defined, as follows:

“In the case at bar we have the president and secretary, who are not only the sole trustees of the corporation, but its sole stockholders, receiving money to the use and benefit of the corporation, and executing a mortgage on the company’s property to secure the payment thereof; and they attach the corporate seal. To what other source could one look for corporate power to do the thing that was done? And then we have the apparent authority and the ratification. Can it be that this instrument is void, and will be so declared by a court of justice, because these two stockholders, officers, and trustees did not convene in board meeting, and solemnly declare and resolve that they, as officers, be authorized to execute the instrument given to secure moneys that such officers received to the use and benefit of the corporation? It could hardly seem so. In such a case the act of meeting together and authorizing themselves to do the thing we call executing the mortgage becomes a mere formality which the law does well to disregard, and the mortgage ought not to, and will not be, held to a nullity because of the omission of the formality.”

It is manifest that it would have been absurd to have had Kirberger solemnly call a meeting of the stockholders or directors of the Trading Company in which he owned all the shares, and then solemnly pass a resolution authorizing the sale of this account. Nothing could have been more absurd. The rule is otherwise in all jurisdictions that we have been able to discover that have had occasions to pass upon this proposition.

In *McElroy v. Minnesota Percheron Horse Co.*, 96 Wis. 377; 71 N. W. 652, the Court, through Marshall, Justice, says:

“George W. Paine was substantially the corporation. He owned all the stock, except six shares obviously kept in the names of others to render them eligible to hold offices. No one but Paine appears to have had any substantial pecuniary interest in the organization. The board of directors was made up of himself, his son Nathan Paine, who lived with him, his son-in-law Charles Nevitt, a resident of the same place, T. M. Brown, an employe on the Minnesota farm, and H. M. Bogart, a relative living in Minneapolis. The corporation affairs, for about five years, had been conducted by George M. Paine and by his predecessor in office without any objections or proceedings whatever by stockholders or directors, so far as appears from the records. No elec-

tion of officers by stockholders was had during that time, and no meeting whatever held, except one a few months before making the contract, at which the only business transacted was to fill the places of several directors who had resigned, which was done by election by those who remained. For two years and more negotiations had been going on for a sale of the property through plaintiff's Chicago agency, all conducted by Paine or his predecessor, as substantially the only persons interested. The whole course of the corporation had been such as to lead the public, and particularly plaintiffs, to regard the president of the corporation as having full power to act in its behalf as its general agent, and to do all that such an agent might properly be authorized to do. Such was the apparent scope of the powers of George M. Paine at the time of the making of the contract in question. To such a state of facts the doctrine of estoppel, upon which all the aforesaid rules are founded, applies to protect the plaintiffs from the injustice of allowing the corporation to repudiate the act of its president, with whom they dealt upon the faith of appearances, for which the corporation was responsible."

In that case, the President of the corporation, without any authority from the Board of Directors or stockholders, entered into a contract for the sale of practically the entire assets of the corporation, agreeing to pay the agent who effected the transfer the sum of \$3750.00. The corporation defended upon the ground that the President had no authority for the sale of real estate, being practically the assets of the corporation, without authority from the Board of Directors. The facts in the above case apply with great force to the case at bar. Kirberger had at all times, without any reference to the stockholders or directors, transacted all the business of the corporation, and had done so for many years prior to the transaction complained of. He owned all the stock of the corporation Trading Company, and, as stated by this Court, in *Pacific State Bank v. Coats*, *supra.*, and to use the language employed by this Court in that case, "can it be that this instrument is void, and will be so declared by a court of justice, because these two stockholders, officers and trustees did not convene in board meeting, and solemnly declare and resolve that they, as officers, be authorized to execute the instrument given to secure moneys that such officers received to the use and benefit of the corporation? It could hardly seem so."

In *Arkansas Pass Harbor Co. v. Manning*, 63 S. W. 627; 94 Tex. 58, the Supreme Court of Texas, through Chief Justice Gaines, in discussing the law in this regard, says:

“That the President has made the deed and the question is, did he have authority to do so. It not appearing that there were any creditors whose interests could be affected, could the consent of all the directors and all the stockholders to the conveyance give authority to make it, there being no ‘corporate action,’ that is to say, no action by the directors as a board? Notwithstanding the authorities which seem to hold to the contrary, we are of opinion that the sounder doctrine is that it could. A stockholder, merely as such, has no direct agency in the control of the business of the corporation. He has no direct interest in its property. His right to such property is collateral. But, in its last analysis, the stockholders are the beneficial owners of the assets of the corporation. This proceeding is instituted upon the theory—which we think a correct one—that the shareholders are the ultimate owners of the corporate property, and, when the corporation is dissolved, and its creditors are satisfied, they hold title to the assets in proportion to their respective shares. The directors must ordinarily make disposition of the corporate property, because its creditors have rights which it is their duty to protect. A majority of the stockholders, even all save one, cannot authorize a sale of the cor-

porate assets, for the reason that every stockholder has the right to require the action of the legally constituted agency—the board of directors—in the management of its business. But when all assent, there being no creditors to complain, they should not be permitted to complain. When every one who has an interest in the property, although that interest may, as long as the corporation exists, be direct, consents that the officer appointed by the law to convey the assets of the corporation, when duly authorized so to do, shall convey, and it is accordingly so conveyed, we are of the opinion that the conveyance should be held good.”

We have cited this case for the sole and only purpose of making clear the proposition that Kirberger being the owner of all of the stock in the Trading Company had the power to make the transfer of its claim against the Packing Co., without a formal order of the Board of Directors.

The rights of the creditors of the Trading Company is one proposition, and the power and authority of Kirberger, its President, to make the transfer in question is another proposition. In other words, the assignment so made is of equal validity as if it had been duly authorized by a formal meeting of the stockholders and by a formal meeting of the directors. This proposition the Court below failed

to appreciate. It was, therefore, not void under such aspect of the case.

The rule above announced is supported by the Supreme Court of the United States, namely:

Union Pac. R. Co. v. Chicago, M. & St.
P. R. Co., 163 U. S. 564; 16 Sup. Ct.
Rep. 1173; 41 L. ed. 265.

It also finds support in the following:

Sun Printing Assn. v. Moore, *supra*.

Jordan v. Collins, 107 Ala. 572; 18 So. 137.

Moore & Handley Hardware Co. v. Towers Hardware Co., 87 Ala. 206; 6 So. 41.

Swift v. Smith, 65 Md. 428; 5 Atl. 534.

and is the rule announced by Professor Thompson on Corporation, Vol. 7, Section 8043.

Such being the law of this case, the question to be determined by this Court is, was the assignment of the Trading Company's claim to Sanborn and Kendall fraudulent, either as to the Trading Company, or to its creditors? Neither Sanborn nor Kendall had any interest in the Trading Company. They were neither stockholders, officers nor agents. They were dealing with an apparently solvent corporation. The same can be said of the appellant. Neither it, nor its officers or agents, had any interest whatever in the Trading Company. It was dealing with an apparently solvent corporation, and a corporation that thereafter continued in business for practically

one year. It was a transaction that the officers of the Trading Company believed to be advantageous to such corporation. It was a fair and honest transaction; it was made for a good consideration, and a consideration which the President, General Manager and owner of all of the stock of the Trading Company believed to be a valuable consideration at the time the transfer was made. A corporation the same as an individual when it is a going concern may prefer one creditor to another.

A creditor of an insolvent corporation can, undoubtedly, consent to the transfer of the assets of a corporation to a third party, and agree to waive its claim against the purchaser, and if such creditor assists in making the transfer and agrees with the purchaser not to enforce its claim against it, such creditor is thereafter estopped from claiming that the transfer of the assets of the insolvent corporation is void to him. *Swain v. Seaman*, 9 Wall. 274.

V.

ESTOPPEL.

We respectfully insist that the transfer of the assets of the Packing Co. to Sanborn-Cutting Co. having been made in the utmost good faith and for a valuable consideration, and that such transfer was made at the request of the Trading Company, and pursuant to an agreement on its part with the appellant that it would not enforce its claim against the

appellant, should the appellant purchase the assets of the Packing Co. and pay all of its bills, excepting its claims, that the Trading Company and its creditors are estopped from enforcing such claim against the appellant. This is unquestionably the rule in all jurisdictions that our attention has been called to. The assignment of the entire assets of a corporation is void only as to creditors not consenting thereto. A creditor has the right to state to an intending purchaser of the assets of an insolvent corporation that if such purchaser consummates the purchase that he will not insist upon his claim being paid by such purchaser. This proposition the Court below entirely overlooked. The facts in this case are, that Kirberger, the President, General Manager and owner of all the stock in the Trading Company, gave the most solemn assurances to the appellant that the Trading Company would waive payment of its claim from the assets of the Packing Co. transferred to the appellant, and in furtherance of that assurance, the Trading Company assigned to Kendall and Sanborn the entire claim of the Trading Company. After such assurances had been made and the assignment delivered, appellant purchased the assets of the corporation. We submit that nothing could be fairer than to hold that under such circumstances neither the Trading Company, nor its officers, could enforce their claim against the appellant, and it would be travesty upon justice to hold that the appellant under those circumstances, after fully complying with all the terms of its contract, should be held in the further sum of \$6688.87.

As we have stated, the Trading Company was entirely solvent. The transaction complained of was completed one year before the Trading Company was declared a bankrupt, and whilst it was a going concern, and it was the honest belief of the owner of the Trading Company that the continued operation of the salmon cannery of the Packing Co. would be of more benefit to the Trading Company than if the sale should not be consummated and the plant thrown into bankruptcy and perhaps never operated. These were the considerations that moved the Trading Company to make the concessions it did.

According to the rule laid down in 7 Thompson on Corporations, Section 8043, the agreement on the part of the President and General Manager of the Trading Company to waive its claim against the appellant and the assignment of such claim to Sanborn and Kendall was known and consented to by all of the stockholders of the corporation, each was consulted, and each consented, and all of the stockholders of the corporation executed the assignment, namely, Ernest Kirberger.

It is true, it was signed by but one director; but, as we have stated, the other two directors were mere creatures of Kirberger and held the stock for his sole use and benefit. It was not the intention of the Trading Company to give anything to the Sanborn-Cutting Co., and it was not the intention of the Trading Company to make a pure gift to Sanborn-Cutting Co. The assignment of the claim in question was

made upon the honest belief that it was a good business transaction, one that would inure to the benefit of the Trading Company. The fact that it turned out otherwise could not effect the equitable rights in the appellant.

There is no evidence in the record of any existence of any creditor at the date of the assignment. The evidence in the record does not show, as we understand it, that the Trading Company was in anywise indebted at the date of the assignment. As we read the record, there is nothing therein showing or tending to show, at the time this assignment was made, that there was then existing any of the present creditors of the Trading Company. As far as from this record appears, every creditor of it has become such after the assignment in question. This being true, they surely could not complain of the transaction in question.

VI

WAIVER

We do not question the doctrine, that where one corporation transfers all of its assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and that it is not necessary that

a fraudulent intent or want of consideration be disclosed. The property is a fund that the law sets apart or charges with a lien in favor of the creditor. That a debtor corporation cannot dispose of its entire assets to the prejudice of its creditors, and that such grantee must take notice that it takes the assets subject to the lien of the creditors. And that when a corporation not in the ordinary course of business transfers its assets to another corporation, the very circumstances of the case imply full knowledge on the part of the transferee of all the facts necessary to charge the property in its hands with the debts of the selling corporation.

This is the rule in Oregon as laid down by Mr. Justice Eakin, in *Williams v. Commercial National Bank*, 49 Or. 492, 498, et seq.; 11 L. R. A., N. S., 857, 860.

Therefore, it matters not, if the officers of the selling corporation be officers of the purchasing corporation. In this case, it is immaterial that Sanborn and Kendall were officers and owned stock in the appellant, and were officers of and owned stock in the Packing Co. The principle so far as this case is concerned is the same, as if the sale had been made to a corporation in which neither had any interest. The appellant knew the financial condition of the Packing Company, and as the consideration for the transfer, agreed to pay its corporate debts,

excepting the debt of the Trading Company which had been assigned to Sanborn and Kendall, and the payment of which claim had been expressly waived by both the Trading Company and Sanborn and Kendall. We do claim, however, that the lien of such creditor can be waived, and such creditor by its acts can be estopped from enforcing such lien.

And we earnestly insist that the evidence in this case clearly, and without any contradiction, shows the Trading Company and Sanborn and Kendall both waived payment by appellant of the claim in question, and by their acts became and were estopped from enforcing such claim and lien.

It was expressly agreed by the President and General Manager of the Trading Company that its claim against the Packing Co. should and would be waived, and the right of such corporation to participate in the assets of such Packing Co. waived, and in order to protect appellant in that regard, the claim was assigned to Sanborn and Kendall. Surely Kirberger had the right to enforce payment of such claim by suit or action, by attachment or otherwise. He had the right to release attachment. He had the right to compromise the claim. He had the power to waive the lien of the Trading Company upon the assets so transferred.

Therefore, it makes little difference in this case, whether he had the power to assign this claim. He surely had the power to waive the claim of lien imposed by law. That he did just this thing is clearly

proved, and cannot be seriously denied. It is conceded that upon the strength of this waiver, the appellant advanced and paid the debts of the Packing Co., aggregating \$81,177.18, and that it would not have done so, unless this lien had been waived. It is unquestioned that the Trading Company honestly believed that in waiving such claim, the best interests of such corporation would be subserved. It cannot be seriously contended that such waiver was not for a valuable consideration.

It cannot be questioned that by its actions, it induced appellant to part with a large sum of money it otherwise would not have parted with, and caused it to prejudice itself in many ways it would not otherwise have done.

It cannot be questioned but that it was the clearly expressed and well understood proposition by all parties concerned that such lien would be and in fact was so waived.

This is easily demonstrated from the evidence. The evidence shows that the stock in the Packing Co. subscribed by Kirberger was subscribed for the use and benefit of the Trading Co. and paid for by it. The Trading Co. purposely permitted Kirberger to vote such stock. Kirberger was, therefore, the trustee and agent of the Trading Company in the voting of such stock, and in his actions as an officer of the Packing Co. Kirberger urged appellant to make the purchase in question; assured appellant that the Trading Company would and did expressly

waive payment of its claim against the Packing Co. and agreed that if appellant should pay all the other indebtedness of the Packing Co., the Trading Company would waive its claim. Kirberger purposely and knowingly left out of the liabilities of the Trading Company the claim of the Packing Co. All these matters were fully, frankly and freely discussed, and appellant relying upon such waiver and representations was induced to part with its money. Such are the facts and such is the evidence in this case.

This being true, the lower Court erred in holding the transfer of the assets of the Packing Co. to appellant void as to the Trading Company, and such assets were a trust fund for such Trading Company, to the extent of ratably paying its claim.

The authorities upon the doctrine of the law of waiver are clearly stated in Volume 4, Words and Phrases, second series, and also in Volume 8, Words & Phrases Judicially Defined, pg. 3775, and in 40 Cyc 252, that a citation of these excellent works it seems is all that is necessary in order to refresh the Court's memory as to the doctrine of waiver.

In *Prichard v. Mulhall*, 118 N. W. 43, 45; 140 Iowa 1, Justice Deemer, speaking for the Court says:

"It is contended for appellant that it is essential to such a waiver as relied upon by plaintiff that it be supported by consideration. This is not true as a matter of fact. A waiver is an intentional relinquishment of a known right, and consideration is not necessary in all cases."

In *Currie v. Continental Casualty Co.*, 126 N. W. 164, 165; 147 Iowa 281, the rule is announced:

“A waiver is the intentional relinquishment of a known right, and any conduct relied on which warrants the belief that such relinquishments has been made constitutes in law a waiver.”

In *Swedish-American Bank of Minneapolis v. Koebernick*, 117 N. W. 1020, 1023; 136 Wis. 473, the Supreme Court of Wisconsin says:

“A waiver is the intentional relinquishment of a known right, which may be shown by a course of conduct signifying a purpose not to stand on a right, and permitting the inference that the right in question will not be insisted on, and where the facts and circumstance relating to the subject are admitted, or clearly established, waiver becomes a question of law.”

In *Alexander v. North Carolina Savings Bank & Trust Co.*, 71 S. E. 69, 70; 155 N. C. 124, it is said:

“A waiver is an intentional relinquishment of a known right, which may be manifested by word or mouth, or by such acts and conduct as would naturally give rise to an inference that a waiver is intended; and there is no waiver unless the intention to waive is understood by the party to be benefited, or where one party has misled the

other, or unless the act relied on ought in equity estop the party from denying it."

In *List & Son v. Chase*, 88 N. E. 120, 122; 80 Ohio St. 42, it is said:

"A waiver is the voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform."

In *Connecticut Casualty Co. v. Bridges* (Texas) 114 S. W. 170, 171, it is stated:

"A waiver may be inferred from any circumstances which show both parties understood that payment of the premium would not be required at a specified date."

In *First National Bank of Brooklyn v. Gridley*, 98, N. Y. Supp. 445, 451, it is stated:

"A waiver is nothing more than the relinquishment of some right, which, being personal, requires no consideration for its support, it does not necessarily rest on the doctrine of estoppel, but results from an agreement between the parties express or implied."

In *Kennedy v. Manry*, 6 Ga. App. 816; 66 S. E. 29, 31, it is said:

“Waiver and estoppel are not synonymous, for, while they have attributes in common, there are still marked differences; waiver being voluntary and intentional, while estoppel in pais may arise from an involuntary and unintentional act, or may result from an act which operates to the injury of another, while there may be a waiver while the opposite party is beneficially affected. Estoppel may arise between consistent remedies, but it depends rather upon what a party caused his adversary to do; while waiver depends on what one himself intended to do.”

In *Johnson v. Spencer*, 49 Ind. App. 166; 99 N. E. 1041, it is said:

“A waiver is a voluntary and intentional relinquishment of a known right, and may be shown by the express contract or other affirmative act of the party charged therewith, or it may be inferred from such conduct as warrants the conclusion that a waiver was intended. The term ‘waiver’ generally implies an intention on the part of the person possessing some right under the contract or the law to relinquish it for the benefit of another. It is ordinarily personal, and, in the absence of some special agreement of consideration, its existence is to be determined solely from the conduct of the parties making it, independent of the

acts of the other party affected. It is distinguished from estoppel in that this personal element is not an essential of estoppel. Nor in estoppel is the intention to relinquish a right necessarily present."

In *Loftis v. Pacific Mutual Life Ins. Co.*, 38 Utah 532; 114 Pac. 134, 139, it is said:

"A waiver operates as an estoppel on the party who waives; but it is not essential to a waiver that a party in whose favor it is made must prove all the elements of an estoppel in pais before he is entitled to avail himself of the waiver."

40 Cyc 252, et seq.

The evidence in this case shows clearly that it was the intention of the Trading Company to, and it did both by words and acts, relinquish its claim against the assets of the Packing Co. That it entered into an agreement with the appellant that if the appellant would purchase the assets, it would not enforce its claim either against appellant, or the assets of the Packing Co., and based upon this express stipulation and the acts of the Trading Company, the appellant purchased the assets of the Packing Co. and paid therefor the sum of \$81,177.18, which it otherwise would not have done had it not been for the stipulations agreements and acts of the Trading Company. Not only that, the Trading Company urged the appellant to make the purchase. Therefore, viewed from any standpoint, the agree-

ments on the part of the Trading Company and its acts amounted to both a waiver of its right to a lien upon the assets of the Packing Co., and also worked an estoppel upon it to enforce such claim.

The testimony of Mr. Kirberger covering this proposition is clear and explicit, pg. 319, appellant's abstract. Referring to this transaction, Mr. Kirberger was asked the following questions:

(Q) And the understanding at that time was that the claim of the Kake Trading and Packing Company should not be paid by the Sanborn-Cutting Company, wasn't it?

(A) It never entered in on anything—never was brought up again, Mr. Fulton. Never since January 6th, never was mentioned again in regard to any matters at all.

(Q) But it was not included?

(A) No, sir, was not included in that.

(Q) And was purposely omitted, was it not, from that statement?

(A) Couldn't help but be omitted after it was signed over.

(Q) I say was purposely omitted?

(A) Yes, sir.

* * * * *

(Q) I know, but wasn't it your understanding, Mr. Kirberger?

(A) Absolutely was my understanding as far as I know, that I couldn't come back

after the account was assigned; I couldn't very well expect the Sanborn-Cutting Company to come back here and pay something that I had agreed to sign over.

* * * * *

(Q) And when these conveyances were executed, conveying the assets of the Kake Packing Company to the Sanborn-Cutting Company, you understood that the claim of the Kake Trading Company against the Kake Packing Company was not to be paid by the Sanborn-Cutting Company?

(A) Yes, I understood that.

(Q) You understood that?

(A) Yes, sir.

(Q) That is what I thought, and so did Messrs. Sanborn and Kendall understand it, and so did the Sanborn-Cutting Company through them—as you understand it, is that right?

(A) Yes, sir.

Nothing could be plainer; nothing could be clearer. The President, the General Manager and owner of all the stock of the Trading Company, and the man who had transacted all of the business of such corporation from the time that he owned all of the stock, which was several years prior to the transactions spoken of here, purposely, deliberately, knowingly and intentionally relinquished the right

of the Trading Company to enforce its lien upon the assets of the Packing Co., and words and acts positively informed the appellant that it would take over the assets, free and clear of all and any claim, equitable or otherwise, of the Trading Company. Such being the facts, the Court below was surely in error in finding to the contrary.

Occupying such position, that Kirberger had power and authority to make this waiver cannot be seriously questioned. It will surely not be contended that before an officer possessing such power and authority could make this waiver, it would be necessary to call a special meeting of the stockholders and trustees of the corporation to give him such authority.

VII.

WAS THE TRADING COMPANY INSOLVENT AT DATE OF ASSIGNMENT OF ITS CLAIM TO SANBORN AND KENDALL? OR DID SUCH ASSIGNMENT RENDER IT INSOL- VENT?

The evidence of the value of the assets of the Trading Company, at the date of the transfer by it of its claim against the Packing Co., is, to say the least, most remarkable. The books kept by the Trading Company show clearly that it was entirely solvent. We call the Court's attention to page 287, et seq.,

appellant's abstract. It is there shown that the value of the assets of the corporation, as shown on the books of such corporation, at this date, was \$23,849.54, exclusive of its claim against the Packing Co., and that its liabilities were \$19,612.18, leaving the assets \$4237.36 in excess of its liabilities.

It is true Kirberger said, that "The Point Barrie" property listed on the books at \$5000.00 had no **real** value. Its value is not stated. It is a matter of common knowledge that in the opinion of many, certain property commanding a large price, and finding ready sale, has no real value. This is largely true of town lots, and other property that readily suggests itself. Taking the entire assets of the Trading Co. at that date, if we include the claim against the Packing Co. in the amount, the claim against the Packing Co. in the amount claimed by the appellee aggregated \$34,182.85, and its liabilities only \$19,612.18. But figure it any way according to the books kept by Kirberger, which he offered in evidence and swore were correct in every particular, both before and after the transfer of its claim against the Packing Co., it was entirely solvent.

We submit that the evidence offered on behalf of appellee as to the value of the assets of the Trading Company should be viewed with cold suspicion. The property is located in Alaska, accessible only by boats. Few people are qualified to testify as to its value living in the states, if any, and then known only to appellee and Kirberger. Appellee called, outside of Kirberger, but one witness as to the value of such

assets. His evidence was not confined to the date of the transfer of the claim in question, but certain "appraisements" made long thereafter, and without any showing as to whether the same property owned by it at such time. Mr. Jaeger was called as a witness, presumably at least to testify to the value of such assets. His testimony is found on pages 339 to 344, both inclusive, of appellant's abstract, and is worthy of great scrutiny and consideration. It is so replete with nothing. It is void.

It will be observed that this witness did not give his opinion of the value of one single holding of the Trading Company. He was asked if he "made an appraisal" of certain property, not the whole property, of the Trading Company. He testified "we" had made certain "appraisements."

The question at issue was not whether this man, or any one else, had made an appraisal of property. The question at issue was, what was its value. Counsel for appellee, with consummate skill, avoided asking him any such question, and he did not state such value. In fact, he was not competent, had he done so. He did not have any knowledge of the value of this property.

Now, what is the Court to think of that character of evidence? Counsel for appellee are clever lawyers, having the experience of years of wide practice. Yet not once was this witness asked to state the value of the assets of the Trading Company, and he did not state in his opinion, or otherwise, what

that valuation was; in fact, his testimony shows him to have been incompetent and unqualified. Can we believe that this was not designedly so arranged? Can we believe if the assets of the Trading Company were less than shown on the books, at the date of this assignment, that this would not have been clearly demonstrated by competent evidence? Why was it not done? Appellant was in no position to furnish evidence of such value on the date in question. Appellant had the right to rely upon the books of such corporation to prove its assets. If the books are correct, and Kirberger says they are, then the Trading Company was clearly solvent at the date of this assignment.

The burden of proof was upon the appellee to show by clear and positive evidence that the Trading Company was insolvent at the date of this transfer. This he has wholly failed to do. On the contrary, he has shown it to have been clearly solvent. Not only did appellee fail to prove the value of the assets of the Trading Company, but an inventory, which was taken in February, 1914, was not produced. Kirberger explained that he "had forgotten it" (pg. 278, abstract). Strange the appellee did not produce. The bank pass book was likewise forgotten (pg. 290, abstract). Strange the appellee did not produce it. produced, but evidence of material facts were "forgotten." A laundry man, who did not claim to have any better knowledge of the value of property in Southern Alaska than the "average man," was called as a witness to prove value, and he was not honored

by even asking his judgment of the value of the assets of the Trading Company. The idea of an expert witness is, that he is supposed to qualify by showing that his knowledge is greater than the average man. What the average man knows about the assets of the Trading Company, we will not presume to venture an opinion. We do express the belief that, as a legal proposition, Mr. Jaegar was not a competent witness to testify as to values. Surely, this oral testimony as to what appraisement was made is not competent. The law requires the appointment of three appraisers in bankruptcy proceedings, and the result of such appraisement reduced to writing and filed with the Referee in Bankruptcy. The contents of such writing, when such contents are material, can be proven only by the writing, or a certified copy thereof. We submit, however, that the contents of such appraisement would not be material evidence in this case against the appellant. Appellant was entitled to have the testimony of a competent witness on that subject, and the right to cross examine him. The appraisement made by appraisers appointed by Referee in Bankruptcy would not be entitled to any greater weight than the assessment roll for taxes. This is universally held not to be competent evidence to prove value. But taking the evidence of Kirberger on value. He states (pg. 278,abstract) that he took an inventory, and later on, says it was the same as shown on his books. But forgot to bring it. He says it was taken in February, 1914.

We then have the judgment of Kirberger that in February, 1914, the assets of the Trading Company aggregated \$34,182.85, and the liabilities less than \$19,000.00.

We, therefore, assert with confidence that the record shows at the date of this assignment in question, the Trading Company was clearly solvent, and in holding it to have been insolvent, the Court below clearly erred. If solvent, then appellant is entitled to a decree as prayed for.

NO EVIDENCE OF THE FILING OF ANY CLAIM AGAINST ESTATE OF BANKRUPT

There is no evidence whatever showing, or tending to show, that any creditor of the Trading Company, or any person whomsoever, filed or presented for filing, any claim against such corporation with the Referee in Bankruptcy. There was no evidence whatever offered on this point, and it, naturally, follows, as a corollary thereto, that there was no evidence offered showing, or tending to show, that the assets of such corporation were insufficient to pay claims filed against such estate. It logically follows that if there were sufficient of the assets of the Trading Company to satisfy and discharge its indebtedness, the Trustee in Bankruptcy would have no right to maintain this suit. This question was squarely before the Supreme Court of the State of

Wisconsin, in *Mueller v. Bruss, et al.*, 112 Wis. 406; 88 N. W. 229, where Bardeen, Justice, says:

“A third proposition is that the trustee cannot maintain this action unless it is shown by the complaint that he has not sufficient assets in his hands to satisfy the claims of the creditors of the debtor. No such showing is made in the complaint. For all that appears therein, there may be money and property enough in his hands to pay every claim filed against the debtor. The conveyances attacked were good between the parties thereto. Third parties are not allowed to impeach them unless it is necessary to do so in order that justice may be done. The trustee has no right superior to that of the creditors he represents. If we admit that the facts stated show such transfers to have been fraudulent, still no right to avoid them exists unless it appears that some one was harmed. It seems quite evident, without argument, that, unless it is made to appear that the property so conveyed is needed to pay the claims filed against the **debtor**, the trustee has no right to set such conveyances aside.”

We made no objections to either of the complaints on this ground; but we did, in the Court below, and do now, make the contention that the appellee has wholly failed to establish the above

state of facts, and, consequently, cannot maintain this suit, and this Court is powerless to do other than to grant the appellant the decree prayed for.

VIII.

JUDGMENT

Should the Court hold against us on the proposition we have heretofore suggested, we submit the Court surely erred in the amount of the judgment awarded. It is claimed by the appellee that the indebtedness of the Packing Co. to the Trading Company, at the date of the transfer of the assets of the Packing Co. to appellant, was \$10,333.31. The Court awarded judgment against the appellant for two thirds of that sum, on the theory that the value of the assets was at that time \$60,000.00, and the indebtedness was \$90,000.00. Therefore, the Trading Company was entitled to only 66 2-3 per cent. on the dollar of its claim.

It seems clear to us that this conclusion is inequitable and against the law and facts of the case. The record shows that Kirberger clearly and explicitly, both by assignment and letter, informed and represented to appellant, that the total of the indebtedness of the Packing Co. to the Trading Company, at such time, was only \$8582.21. This was the understanding of all the parties. It was upon this representation and understanding that appellant advanced \$81,177.18 as the purchase price of such assets. Now, to permit the representative of the

Trading Company to show that such indebtedness was greater than what all parties agreed and understood it to be is unjust and unfair, and entirely overlooks the well established doctrine of equitable estoppel. It is conceded that the books of the Packing Co. showed an indebtedness to the Trading Company in the sum of \$8582.21 only, and that the president and general manager and owner of all the stock in the Trading Company represented such books to be correct in this particular. Under such state of facts, the Trading Company and its representative and its creditors are surely estopped from claiming a larger sum. This would fix the limit of appellee's recovery to \$5,721.47.

IX.

INTEREST.

In addition to the sum awarded appellee, the court awarded it interest from May 12, 1914, at 6 per cent. per annum until paid. The judgment was entered May 24, 1916. This interest amounted at that date to the not insignificant sum of \$414.70.

In awarding appellee interest, the lower Court undoubtedly overlooked the case of *Sargent v. American Bank & Trust Co.*, 80 Or. 45-46, and *Richardson v. Investment Co.*, 66 Or. 353-358, where it is held that, under the laws of Oregon, interest can be recovered only where an express promise is made to pay same, or where interest is expressly allowed by statute.

It is most unfortunate, indeed, that it was deemed necessary that the appellant should have been subjected to the humiliation of being charged with the acts of fraud and dishonesty found in the pleadings on the part of appellee. It is, indeed, remarkable that such charges should have been made, when the evidence is considered.

It is difficult to believe that these charges of fraud were purposely, deliberately, and maliciously made, for the purpose of prejudicing the Court against the appellant and the co-defendants, men of the highest standing, both socially and financially, yet, regretting the necessity, we feel fully justified in saying that, in our judgment, these false and libelous charges were so made. We have no hesitancy, however, in saying that charges of such character injure rather than aid the parties making them in suits before a Court.

We respectfully submit that the decree of the Court below was erroneous, and that appellant is entitled to a decree as prayed for.

G. C. & A. C. FULTON,

Attorneys for Appellant.

—IN THE—
**UNITED STATES
CIRCUIT COURT of APPEALS
FOR THE NINTH CIRCUIT**

SANBORN-CUTTING COMPANY, a corporation,
Appellant,

—VS.—

V. A. PAINE, as Trustee of the Kake Trading and
Packing Company, a corporation, Bankrupt,
Appellee.

Brief for Appellee

*On Appeal from the District Court of the United States
for the District of Oregon.*

HON. R. S. BEAN, District Judge

GUNNISON & ROBERTSON, Juneau, Alaska,
JAMES J. CROSSLEY, Portland, Oregon,
ATTORNEYS FOR APPELLEE.

Filed

FEB 10 1917

F. D. Monckton

Clerk

Filed this day _____ of February, 1917.

FRANK D. MONCKTON, Clerk,

By _____
Deputy Clerk.

—IN THE—
UNITED STATES
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FOR THE NINTH CIRCUIT

SANBORN-CUTTING COMPANY, a corporation,
Appellant,

—vs.—

**V. A. PAINE, as Trustee of the Kake Trading and
Packing Company, a corporation, Bankrupt,**
Appellee.

Brief for Appellee

STATEMENT OF FACTS.

Inasmuch as, in our opinion, appellant's statement of facts is manifestly erroneous, we strenuously controvert it and, hence, shall briefly set forth the facts of the case. However, before discussing the facts disclosed by the evidence, we shall summarize the pleadings.

Appellee (plaintiff below) on December 6, 1915, instituted two suits: one in the United States District Court for Oregon, at Portland, Oregon, and one in the District Court for Alaska, at Juneau, Alaska, in both of which the Sanborn-Cutting Company (appellant) and the Kake Packing Company (hereinafter designated as Packing Company) were defendants. In the suit instituted in Oregon, F. P. Kendall, George W. Sanborn

and S. S. Gordon were also made defendants. For convenience, these suits are hereinafter respectively designated as the Oregon suit and the Alaska suit.

PLEADINGS.

OREGON SUIT

Complaint.

Alleges the bankruptcy and citizenship of the Kake Trading and Packing Company (hereinafter designated as Trading Company) (P. R. 4); the qualification of appellee as trustee, and that assets in hand are insufficient to pay the claims of the bankrupt's creditors (P. R. 5); the citizenships of the various defendants (P. R. 5); the management of the Trading Company by Kirberger, and the latter's illusions as to prospects of fishing industry (P. R. 5, 6); the formation and organization of the Packing Company (P. R. 6, 7, 8); the knowledge of the individual defendants of the corporate character of the Trading Company (P. R. p. 8); the ownership of property in or near Kake, Alaska, by the Trading Company, which property was valuable for use in the fishing industry (P. R. 8); the agreement, and its fulfillment, of Trading Company to convey said property to Packing Company for 85 shares stock in latter company (P. R. 8, 9); the payment of \$8500.00 to Trading Company for said property, and repayment of said sum to Packing Company for said shares of stock (P. R. 9); the delivery of said stock in Kirberger's name but that he took it as trustee for Trading Company, with whose assets the stock was purchased, and that said stock became property of appellee upon his appointment as trustee (P. R. 9); indebtedness of Packing Company to

Trading Company for \$4,000.00, and its payment to Trading Company, and the unauthorized use thereof by Kirberger in purchasing 40 additional shares of stock in Packing Company (P. R. 10); the knowledge of individual defendants of Kirberger's unauthorized use of said \$4,000.00 which was property of Trading Company (P. R. 10); the taking of said 40 shares in name of Kirberger, but that he held them in trust for Trading Company, and that appellee became owner thereof upon appointment as trustee (P. R. 11); allegation as to amount of stock subscribed and paid for of Packing Company (P. R. 11); assignment on or about January 14, 1914, of said 125 shares of stock in Packing Company (being the 85 shares plus the additional 40 shares) to Kendall and Sanborn by Kirberger, in fraud of the Trading Company, and with intent to hinder, delay and defraud the latter's creditors (P. R. 11); the knowledge of Sanborn and Kendall (P. R. 12); the insolvency at that time of the Trading Company, and the knowledge of Kendall, Sanborn and Kirberger thereof (P. R. 12, 13); the unlawful conveyance of all the assets of the Packing Company to the appellant on or about May 11, 1914, the domination of the Packing Company by appellant at that time (P. R. 13, 14, 15); the holding by Sanborn and Kendall of said 125 shares of stock (P. R. 15); the discontinuance of the business of the Packing Company by reason of the sale of its entire assets, and the use of the latter by appellant (P. R. 15); the earning of profits by appellant from use of said assets, and failure to account therefor (P. R. 16, 17); that the terms and forfeitures of the assignment of January 6,

1914, are unjust, harsh and inequitable, its consideration grossly inadequate; and that it was not mutual but solely for benefit of Sanborn and Kendall, and made by Kirberger without authority (P. R. 17); the making by Packing Company of conveyance to appellant in violation of rights of minority stockholders and in violation of duties of its board of directors (P. R. 19); the domination of Packing Company by Kendall, Gordon and Sanborn and that the Packing Company will not take steps to avoid and set aside said conveyance (P. R. 20).

Answer.

Appellant answered generally and with three affirmative defenses; admitting the conveyance to it of the Packing Company's entire assets (P. R., p. 27), however, claiming the conveyance was bona fide for an agreed consideration of \$72,621.01, but that it actually paid \$81,177.18 in gold coin (P. R. 28). It also alleged that appellee ought to be estopped from contending the conveyance was fraudulent and void, because it had paid said sum for said assets (P. R. 29, 30). It further alleged that on May 12, 1914, the Packing Company offered to sell its entire assets to appellant for \$72,621.01, being its represented entire liabilities, exclusive of a claim of \$8,582.21 then owned by Kendall and Sanborn, being a claim for goods, wares and merchandise which the Trading Company had sold and delivered to the Packing Company (P. R. p. 31), which claim had theretofore been assigned to Kendall and Sanborn, and Kendall and Sanborn agreed to cancel and discharge said indebtedness if appellant would accept such offer of the Packing Company (P. R. p. 31) that appellant accepted said

offer and on May 12, 1914, the Packing Company, upon authorization of its stockholders and board of directors, conveyed its entire assets to appellant (P. R. p. 32); that the Packing Company at said time delivered a statement of its liabilities amounting to \$72,621.01, which was incorrect as it should have been \$81,177.18, which last named sum appellant paid (P. R. 32, 33). In its third affirmative defense, appellant set up appellee's complaint in the ALASKA suit (P. R. pp. 35 to 52); that appellant had been duly served with summons in that suit and had entered its appearance; that the appellee should be restrained from prosecuting the ALASKA suit (P. R. pp. 53, 54).

Reply.

Appellee replied, denying that appellant was a bona fide purchaser for a valuable consideration or that the conveyance of the Packing Company's assets was made in good faith (P. R. p. 57), and alleged that appellant had knowledge of the affairs of the Packing Company (P. R. 58). In reply to the first and second affirmative defenses, appellee alleged that the 125 shares of stock in the Packing Company, purchased with assets of and owned by the Trading Company, had been conveyed to Kendall and Sanborn, with knowledge, to defraud the Trading Company and to hinder, delay and defraud the latter's creditors (P. R. pp. 58, 59, 69, 70); that the Trading Company was then insolvent, that all the parties had knowledge thereof, that Kirberger had no authority to make said assignment, that Kendall and Sanborn had knowledge of such want of authority, that the latter are not bona fide purchasers of said stock for a

valuable consideration, and that the Trading Company never authorized or ratified said assignment (P. R. pp. 58, 59, 60, 61, 62, 63, 70, 71, 72); that said assignment is null and void (P. R. 61, 63, 71, 72); that in pursuance to the plan under which said stock assignment was made, the Trading Company on January 6, 1914, through Kirberger, assigned to Kendall and Sanborn a debt of \$8,582.21 which the Packing Company then owed the Trading Company, with intent to hinder, delay and defraud the latter's creditors and to defraud the Trading Company thereof (P. R. pp. 62, 63, 72, 73). (At this point, attention is called to the fact that it is apparent that the printed record is typographically incorrect in that the printed matter on page 62 and at top of page 63 should follow the printed matter commencing with the paragraph on page 63. This is clearly shown by a comparison with pages 72 and 73 of the printed record.) Kirberger's want of authority to make said assignment, and that the Trading Company has never authorized or ratified the same (P. R. p. 62); the insolvency of the Trading Company at that time, and the knowledge of the parties of said insolvency (P. R. pp. 62, 73); that said assignment is null and void (P. R. 63, 74); the conveyance of the Packing Company's entire assets to appellant (P. R. pp. 64, 75); the domination of the Packing Company by appellant (P. R. pp. 64, 65, 66, 76, 77, 78); that said conveyance was made in violation of the rights of the Packing Company's minority stockholders and with intent to hinder, delay and defraud its creditors, particularly its creditor, the Trading Company (P. R. p. 65, 66, 67, 76, 77, 78); that said

conveyance is null and void (P. R. p. 67, 74, 75, 78); that appellant took said assets with knowledge of the unpaid debts of the Packing Company (P. R. p. 66, 76, 77); that appellee obtained judgment in the District Court for Alaska against the Packing Company on August 27, 1915, for \$10,333.31, together with interest and costs, aggregating \$10,833.31; that execution on said judgment has been returned nulla bona; and that appellee, in addition to the relief prayed for in the complaint, is entitled to recover that further sum from appellant (P. R. 67, 68, 81, 82). In his reply (P. R. p. 83) to appellant's third affirmative defense, appellee set up in haec verba the judgment (Pl. Ex. 70) obtained by him against the Packing Company (P. R. p. 95); the return of execution (Plff. Ex. 71) in that suit nulla bona and wholly unsatisfied (P. R. p. 96); that the stock assignment and the debt assignment were each invalid, null and void; that the conveyance of the assets was invalid, null and void; the knowledge of the appellant; the domination of the Packing Company by appellant. Appellee renewed the prayer of his complaint and also asked for decree for the further sum of \$10,833.13, being the \$10,333.13 plus costs and interest from January 31, 1915, and that Kendall and Sanborn be restrained from disposing of both the 125 shares of stock and the claim against the Packing Company (P. R. p. 100).

ALASKA SUIT.

Complaint.

The complaint, in brief, alleged the adjudication in bankruptcy of the Trading Company (P. R. p. 107); the appointment of the appellee as trustee in

bankruptcy (P. R. p. 107); the citizenship of the Packing Company (P. R. p. 108); its failure to properly domesticate in Alaska and pay the annual territorial license fees (P. R. p. 108); the citizenship of the appellant (P. R. p. 108); its failure to properly domesticate in Alaska and pay the annual territorial license fees (P. R. p. 108); its doing of business in Alaska and within the jurisdiction of the Alaskan court since May 12, 1914 (P. R. p. 108); the devolution upon appellee as trustee of the property and assets of the Trading Company, including a debt against the Packing Company (P. R. p. 109), for which on August 27, 1915, in the District Court for Alaska, at Juneau, appellee obtained judgment against the Packing Company in the sum of \$10,333.31, with interest from January 31, 1915 (P. R. pp. 109, 119); that an execution issued August 31, 1915, on said judgment to the United States Marshal for the division of Alaska in which the Packing Company property was located, had been returned wholly unsatisfied and nulla bona (P. R. p. 110); that on May 12, 1914, the Packing Company with intent to hinder, delay and defraud its creditors, particularly its creditor, the Trading Company, conveyed all its assets to the appellant (P. R. p. 111); that at the time of the transfer the Trading Company was a creditor of the Packing Company (P. R. p. 112); that the appellant was not a bona fide purchaser of said assets (P. R. p. 112); but on the contrary had full notice, and assisted and aided the Packing Company (P. R. p. 112); that the directors of the Packing Company and of appellant schemed and conspired together

to defraud the Trading Company out of, and from obtaining payment of, its debt against the latter; that at the time of the making of said conveyance the majority of the stock of the Packing Company was controlled and dominated by owners of the majority of the stock of the appellant, and the board of directors of the Packing Company was dominated and controlled by the board of directors of the appellant (P. R. 112); that two of the directors of appellants were owners of the majority of the stock of the Packing Company, and dictated, dominated, controlled and held the majority of the stock of the latter corporation; that one of the directors of the appellant was a director of the Packing Company; that the appellant caused the Packing Company to convey to the former all the latter's assets with the intent to hinder, delay and defraud all the Packing Company's creditors, including the Trading Company, except those debts which said directors and their relatives of the Packing Company held, and that the Packing Company conveyed to the appellant with said intent; that appellant received said assets with knowledge and notice that the Packing Company owed just and lawful debts which had not been paid, and that its creditors would be delayed, hindered and defrauded; that said property is equitably subject to the payment of the Packing Company's debts (P. R. pp. 113-114); that practically all of said assets at all of said times were within the jurisdiction of the Alaskan court (P. R. p. 114); that appellant is in possession of said property and has used the same for its own profits and has made large and remunerative profits and earnings out

of its use and operation, and claims to be the owner thereof (P. R. p. 114, 115); that there are a large number of unpaid creditors of the Trading Company who have filed proofs of their claims in the bankruptcy proceedings, and that the assets of the bankrupt Trading Company are not sufficient to pay the lawful claims of its creditors (P. R. p. 115); that the creditors of the Trading Company have been hindered, delayed and defrauded in the collection of their said debts against the bankrupt Trading Company, and the Trading Company itself and the appellee as its trustee have been hindered, delayed and defrauded in the collection of the said debts for which said judgment was obtained by reason of said conveyance, and that they will be permanently hindered, delayed and defrauded in the collection thereof unless appellant is commanded to reconvey said assets to the Packing Company, or decree that said property is subject to the unpaid debts of the Packing Company, or decree that appellant pay the unpaid debts of the Packing Company, including said judgment (P. R. p. 115, 116); that no part of said judgment has been paid, and the whole is due, amounting to \$10,333.31, with interest from January 31, 1915, and costs in the suit in which judgment was obtained, amounting in all at the date on which judgment was rendered in the suit against the Packing Company to \$10,833.31 (P. R. p. 117). Appellee prayed that said conveyance be adjudged null and void, that the appellant account for the use of said assets, and for the earnings and profits thereof, and make restitution of said assets, profits and earnings, or, if resti-

tution cannot be had, that it be adjudged that appellant hold said property subject to the debts of the Packing Company, and that sufficient thereof be sold to satisfy the unpaid debts of the Packing Company, including said judgment recovered by appellee against the Packing Company, or, if neither restitution nor sale can be had, that the appellant be required to pay the unpaid debts of the Packing Company, including said judgment recovered by appellee against the Packing Company, amounting to \$10,333.31, with interest from January 31, 1915, and costs in the suit in which said judgment was obtained, aggregating \$10,833.31, with interest from August 27, 1915 (P. R. p. 117, 118); attached to said complaint was a copy of the judgment (P. R. p. 119) obtained in cause No. 1328-A of the District Court for Alaska, at Juneau, appellee against the Packing Company, and a copy of the purported conveyance (P. R. p. 120) by the Packing Company to the appellant of all the former's assets.

Answer.

Appellant answered generally in the Alaska suit, admitting that it is an Oregon corporation, and alleging authorized to engage in business in Alaska, and domesticated and licensed therein (P. R. p. 124); admitted that appellee as trustee became owner of all assets of bankrupt Trading Company (P. R. p. 126), but denied that he ever became owner of the debt on which he obtained judgment against the Packing Company (P. R. p. 127); denied that said debt was an asset of the bankrupt estate; alleged that on January 6, 1914, the Trading Company assigned said debt

to Kendall and Sanborn, and latter became owners thereof; that appellee obtained said judgment by fraud; that on May 12, 1914, the Packing Company sold all its assets to appellant for \$72,621.01; that appellant became the owner thereof, and paid said consideration to the Packing Company in gold coin, together with further sum of \$8,556.17, making a total of \$81,177.18 paid for said assets and received by Packing Company (P. R. p. 129); that at said time Kendall and Sanborn were the owners of said debt; and that the Trading Company was not then a creditor of the Packing Company; that appellee knew of conveyance (P. R. p. 131) at time he qualified as trustee; that the Packing Company before the Trading Company was adjudicated a bankrupt paid the latter all its claims, including said debt, against the former (P. R. p. 132); admits that it took possession of assets of Packing Company, and has used and operated the cannery (P. R. p. 133); denies that it has made large profits. It also set up three affirmative defenses. The first of which alleges citizenship of appellant; business and domestication in Alaska; citizenship of Trading Company and business in Alaska; management by one Ernest Kirberger; citizenship of Packing Company; that Kirberger also its President and General Manager; operations in Alaska; that at close season 1913 Packing Company's books showed assets \$76,300.65, and liabilities \$81,203.22 (P. R. p. 136, 137); that said assets did not exceed \$65,000.00 (P. R. p. 137); and, on execution or bankruptcy sale, \$40,000.00; that Packing Company unable to continue

operations account finances (P. R. p. 137); that Trading Company on January 6, 1914, while a going concern, assigned for a valuable consideration to Kendall and Sanborn its entire claim against Packing Company, aggregating \$8,582.21; that said claim never became assets of appellee as trustee in bankruptcy of Trading Company; that appellee falsely claimed there was \$10,333.31 due Trading Company from Packing Company in his suit against the latter; that the judgment in the last mentioned suit was fraudulent. The second affirmative defense, after alleging citizenships and business, and financial condition of Packing Company, as aforesaid, alleged that on May 11, 1914, Packing Company offered to and did sell to appellant its entire assets for \$72,621.01; that said sale was authorized by the stockholders and directors of the Packing Company; that appellant has ever since said time been the owner of said assets, and the appellee has no right thereto; that appellee should be enjoined from claiming to own any of said property or from contending that said conveyance was null and void. The third affirmative defense alleges that the appellee should be estopped from claiming that said conveyance was null and void.

Reply.

All the affirmative allegations in appellant's answer were denied (Stipulation, P. R. p. 103; Order, P. R. p. 105).

The Alaska suit was consolidated with and submitted for determination with the Oregon suit (Stipulation, P. R. p. 101; Order, P. R. p. 104).

It is therefore clearly evident that originally the

two suits were easily distinguishable, being not only dissimilar in theory but also in the relief and subject matter; that their apparent similarity arises out of the fact that they both sought to have assets of the Packing Company restored by the appellant for the purpose: in the Oregon suit, at the request of a minority stockholder; in the Alaska suit, that a judgment creditor might obtain payment of its claim. This apparent similarity was increased by the fact that appellant in his third affirmative defense (P. R. p. 35), in the Oregon suit, set up the complaint filed by appellee in the Alaska suit, and that in answer thereto the appellee in his reply set up the judgment (P. R. p. 95) obtained by him in the suit which he brought against the Packing Company in the District Court for Alaska, and prayed for the further relief that appellant be required to pay that judgment. This then placed the pleadings in the Oregon suit in such condition that all of the pleadings in the Alaska suit were contained therein with the exception of appellant's answer in the Alaska suit. It should be borne in mind that there are three suits involved, i. e.: the Oregon suit; the Alaska suit, and the suit No. 1328-A in the District Court for Alaska in which appellee obtained judgment against the Packing Company, and for the payment of which judgment the Alaska suit was instituted, although, as stated, appellee in his reply in the Oregon suit also requested decree for the payment of said judgment. So far as recovery as a minority stockholder is concerned, while we are unable to agree with the learned trial court, at the same time we realize that it held against appellee on that score.

FACTS.

Appellee (plaintiff below) is the duly appointed, qualified and acting trustee in bankruptcy of the Kake Trading and Packing Company, herein designated as the Trading Company, which upon its own petition was duly adjudicated a bankrupt on April 9, 1915, by the United States District Court for Alaska, at Juneau (P. R. p. 175), and the appellee as such trustee does not have sufficient assets in hand to pay the just and lawful claims and demands of the creditors of the bankrupt Trading Company which have been filed against it in the bankruptcy proceedings (P. R. pp. 175, 176; Plff. Ex. 1 and 2).

The Trading Company is a Washington corporation (P. R. pp. 4, 176, 178), organized in 1904 by Burwell, Morford, Sepp and Ernest Kirberger, with a capitalization of \$25,000.00 (P. R. p. 178), the stock being divided into 25,000 shares of the par value of \$1.00 each (P. R. p. 210). Burwell subscribed for 24,998 shares, Kirberger for one share, and Morford for one share (P. R. p. 210). Burwell paid for his 24,998 shares by transferring certain property to the corporation (P. R. pp. 204, 206, 207, 208), which property was afterwards acquired by the Packing Company, and later, by the conveyance in suit, by the appellant from the Packing Company (P. R. p. 204). Kirberger afterwards purchased a quarter interest in the stock, or 6250 shares, from Burwell (P. R. pp. 206, 208), and later purchased a further 18,747 shares from Burwell (P. R. p. 210; Plff. Ex. 25), making a total of 24,998 shares which he owned at the time of the trans-

actions in suit (P. R. pp. 210, 211, 242, 243, 244). Kirberger was president, manager, and a trustee of the Trading Company (Plff. Ex. 62). The Trading Company was engaged in business at and near Kake, Alaska, its chief business being a mercantile business (P. R. p. 180).

The Kake Packing Company, herein designated as the Packing Company, is an Oregon corporation (P. R. p. 176), which was organized by Kendall, Sanborn and Kirberger with a capitalization of \$50,000.00 divided into 500 shares of the par value of \$100.00 each (P. R. p. 187). Sanborn subscribed for 85 shares, Kendall for 85 shares, Gordon for 60 shares, G. C. Fulton for 20 shares, F. H. Sanborn (son of G. W. Sanborn) for 10 shares, A. C. Kirberger (brother of Ernest Kirberger) for 60 shares, and Ernest Kirberger in all for 125 shares. Kirberger took the 125 shares in his own name, although they were all paid for with assets of the Trading Company (P. R. pp. 187, 189-194). The Trading Company, by resolution (P. R. pp. 188, 204; Plff. Ex. 15), authorized Kirberger to purchase 85 shares by transferring to the Packing Company certain of its property (P. R. p. 210). However, the Trading Company never authorized Kirberger to purchase the additional 40 shares, and, when he subscribed for the same he expected to pay for it by raising money from his sister (P. R. p. 187), but the Packing Company became indebted to the Trading Company for \$4,000.00, in payment of which it remitted its check for that amount, which check Kirberger endorsed back to the Packing Company in pay-

ment of said 40 shares (P. R. pp. 189-194). Gordon and Sanborn had knowledge that this \$4,000.00 of the Trading Company was used by Kirberger to purchase this 40 shares of stock; in fact, the endorsement was prepared by them before forwarding check to Kirberger in the first instance (P. R. pp. 194, 195; Plff. Ex. 16 and 17). Kirberger was also president and manager of the Packing Company (P. R. p. 188), but was under the supervision of Kendall and Sanborn (P. R. p. 327).

Appellant is an Oregon corporation (P. R. p. 176), organized in 1902 (P. R. p. 345), of whose stock the defendants Sanborn and Kendall were the sole owners (P. R. pp. 256, 437). Sanborn was its president and general manager (P. R. p. 313), and Kendall and Sanborn were the sole agents and representatives of, and duly authorized to act for, appellant in the transactions involved (P. R. pp. 257, 312, 313, 379).

On January 6, 1914, Kirberger made two assignments to Kendall and Sanborn, i. e.: One of said 125 shares of stock in the Packing Company (P. R. pp. 229, 230; Plff. Ex. 59, 60), which stock had been purchased with assets of the Trading Company (P. R. pp. 187-194); and one of an indebtedness owing to the Trading Company from the Packing Company for goods, wares and merchandise furnished and moneys advanced, amounting to \$8582.21 (P. R. pp. 231, 232; Plff. Ex. 61).

At the time of making said assignments the Trading Company was insolvent (P. R. pp. 227; Plff. Ex. 67, 67a; Op. Trial Court, P. R. p. 157); and the Trad-

ing Company and Kirberger (P. R. p. 227), as well as Kendall and Sanborn, each knew and had reasonable cause to believe that the Trading Company was insolvent (P. R. pp. . . . ; Plff. Ex. 49, 58 and 58b), and they and appellant knew that the Trading Company was a corporation (P. R. pp. 212, 392, 393, 406, 442).

The Trading Company received no consideration for either of said assignments except the sum of \$1.00 (P. R. p. 249; Op. Trial Court, P. R. p. 157), although appellant claimed that Kirberger thereby received an option on stock in the Packing Company. The assignment (Plff. Ex. 59) contained statements which were not true, and on its face purported to give Kirberger an option to purchase 170 shares of stock for \$65,000.00; whereas, the par value of said stock was only \$17,000.00 (P. R. pp. 229, 230, 231, 383-387). The Trading Company never authorized nor ratified said assignments, but at the first meeting of its stockholders and board of trustees held after the making thereof disapproved and discountenanced the same (P. R. pp. 234, 245, 248; Plff. Ex. 62; Op. Trial Court, P. R. p. 157). On March 21, 1914, the terms of said option were attempted to be changed by an additional writing.

On May 11 or 12, 1914, upon offer of the appellant (P. R. pp. 256; Deft. Ex. —), the Packing Company conveyed by bill of sale (Plff. Ex. 64) its entire assets to appellant for an alleged consideration of \$72,621.01. However, not one cent of money actually changed hands, but the transfer was entirely a matter of book entries (P. R. pp. 258, 265, 266, 401, 403,

404); the appellant assuming part of the liabilities (P. R. p. 351) of the Packing Company and paying them itself, not delivering the consideration to the Packing Company for distribution. As a matter of fact thousands of dollars of said liabilities were not paid until the fall of 1914 after large profits had been earned off the operation of said plant (Sanborn's testimony; also P. R. pp. 295, 296); and several thousand dollars had not been paid at the time of the trial (P. R. pp. 368, 371, 372). Kendall and Sanborn, who were sole owners of the stock of the appellant (P. R. pp. 256, 437), acted for and represented the appellant in the transaction (P. R. pp. 256, 312, 313, 379), being at the same time stockholders and officers of the Packing Company. The Packing Company immediately ceased business and Kendall and Sanborn knew prior to and at the time of the sale that the Packing Company was going out of business (P. R. pp. 315, 399, 402), and also knew that the \$8,582.21 account was a just debt against the Packing Company in favor of the Trading Company (P. R. pp. 441). The Packing Company on the date of the conveyance was insolvent (Op. Trial Court, P. R. p. 154). Practically all the liabilities which appellant assumed were either personal claims of Kendall, Sanborn, Sanborn & Son, or appellant, or liabilities which they had either secured or indorsed (P. R. pp. 252, 253, 305, 347, 377, 379). On the same date, Kirberger, the Trading Company, and the Packing Company (Plff. Ex. 65) deeded to appellant for an alleged consideration of \$10.00 a certain tract of land about one mile southeast of the village of Kake, Alaska, for which the

Trading Company later in November, 1914, received patent from the United States (Plff. Ex. 9). The Trading Company did not authorize said deed (P. R. p. 262), and received no consideration as a matter of fact (P. R. p. 262), and was at said time insolvent. The tract involved was the same tract which had been conveyed by Burwell to the Trading Company, by the latter to the Packing Company (P. R. pp. 203, 204), and the consideration of \$1750.00 for which was charged back against the Trading Company on the books of the Packing Company at the direction of Sanborn (P. R. pp. 221, 261, 405) until such time as patent was received by the Trading Company from the United States. Neither the Packing Company nor appellant has paid the Trading Company said \$1750.00 for said tract (P. R. pp. 400, 405).

On August 27, 1915, appellee duly obtained judgment in cause No. 1328-A in the District Court for Alaska, at Juneau, against the Packing Company (Plff. Ex. 69) for \$10,333.31, together with costs and interest from January 31, 1915, aggregating \$10,833.31. This \$10,333.31 includes the debt of \$8,582.21 for goods, wares and merchandise furnished and moneys advanced, which has not been paid (P. R. p. 225), and the further item of \$1750.00 on account of the consideration for said tract of land (P. R. pp. 225, 226, 294, 295; Op. Trial Court, P. R. pp. 154, 155). An execution which was duly issued on this judgment was returned wholly unsatisfied and nulla bona (Plff. Ex. 70).

Appellant from its operation of said plant made

profits in 1914 of \$13,911.83, and in 1915 of \$13,893.36 (P. R. pp. 295, 296; Deft. Ex. B).

The question is: Is the appellant liable to the appellee for the \$10,333.31, or a pro rata thereof based upon the ratio of the assets and liabilities of the Kake Packing Company at the time appellant took its entire assets?

We most respectfully submit that the question must be answered in the affirmative for the reasons herein-after mentioned.

POINTS.

1. A trustee in bankruptcy takes better title than the bankrupt, and is given the right of a judgment creditor holding an execution duly returned unsatisfied with respect to property not in custodia legis.

2. The creditors of a corporation have a claim upon its assets of which they cannot be deprived by an unauthorized act of the corporation or of its officers, although such officers may own all the stock in the concern.

3. A corporation holds its property subject to the payment of the corporate debts and cannot sell or in any wise alien its property to the prejudice of its creditors so as to hinder, delay or defraud them in the collection of their debts owing by it, and when the corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is charged with knowledge that the property is subject to the corporate debts, and equity will allow the corporate creditors to follow the property into the hands of purchasers for the satisfaction of their claims.

ARGUMENT.

I.

A TRUSTEE IN BANKRUPTCY TAKES BETTER TITLE THAN THE BANKRUPT, AND IS GIVEN THE RIGHT OF A JUDGMENT CREDITOR HOLDING AN EXECUTION DULY RETURNED UNSATISFIED WITH RESPECT TO PROPERTY NOT IN CUSTODIA LEGIS.

(a) Bankruptcy Act of 1898 amended June 25, 1910, gave trustee additional rights.

It is admitted that appellee is the duly appointed, qualified and acting trustee in bankruptcy of the Trading Company, which was duly adjudicated a bankrupt in 1915 (P. R. p. 175). Appellant has obviously overlooked the amendment of June 25, 1910, to the Bankruptcy Act of 1898, and the decisions of this and other Courts as to the effect thereof.

In *Pacific State Bank vs. Coats*, 205 Fed. 618, at 622, this Court, speaking through Judge Wolverton, said:

“It is the purpose of this amendment to vest in the Trustee for the interest of *all* creditors, the potential rights of creditors possessing or holding liens upon the property coming into his custody by legal or equitable proceedings. The Trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt;” * * *

To the same effect, see:

Cooper Grocery Co. v. Park, 218 Fed. 42 (5 C. C. A.).

In re Lane Lumber Co., 217 Fed. 550 (9 C. C. A.)

In re Gebris-Hebrine Co., 188 Fed. 503.

In re Kessler, 186 Fed. 127.

In re Kobler, 159 Fed. 871.

Loveland on Bankruptcy, 4th Ed. Vol. 1, 768.

Falco v. Kanpisch Creamery Co., 42 Or. 422, 70 Pac. 286.

In re Downing, 201 Fed. 93 (2 C. C. A.)

It is therefore apparent that decisions similar to *Zarlman v. Bank*, 216 U. S. 134, which was decided prior to said amendment, are no longer pertinent. Point I of appellant's brief therefore requires no further discussion.

Furthermore, it is a sufficient answer to Point II of appellant's brief to call attention to the evidence (P. R. pp. 175, 176; Pl. Ex. 1 and 2), which clearly adduces the very proof that appellant therein makes demand for; disclosing that claims have been filed and that there are not sufficient assets in hand to pay the same in full.

(b) A trustee in bankruptcy may set aside fraudulent conveyances even though the creditors of the bankrupt were not such creditors at the time of said conveyance.

The Trading Company was a creditor of the Packing Company on January 6, 1914 (P. R. pp. 231, 232, 441), for \$10,333.31, which has not been paid (P. R. pp. 225, 400, 405). At least part of the creditors of the bankrupt, now represented by appellee as trustee, were creditors of and held claims against the bankrupt on January 6, 1914 (P. R. pp. 175, 176; Pl. Ex. 1 and 2).

While appellee in his capacity as trustee in bankruptcy has all the rights of a judgment creditor (*Pacific State Bank v. Coats*, *supra*, and other cases above cited), yet appellee has gone further than this and has exhausted his legal remedies before seeking to require appellant to pay the indebtedness owing to the bankrupt by the Packing Company (Pl. Ex. 69 and 70). Appellant contends that this judgment is void, although there is an absolute lack of argument and authorities to support that contention. However, we submit that the record discloses that this judgment is valid, and obtained fairly and honestly. Moreover, that appellee in bringing the suit in which the judgment was rendered acted in the best of faith and endeavored to obtain payment of the claim due the Trading Company from the Packing Company, without in anywise subjecting appellant to any embarrassment. Furthermore, appellant was in no wise injured by the rendering of the judgment, and it was not necessary to first bring a direct action to set aside the assignment of January 6, 1914, before bringing the suit against the Packing Company.

Buffalo v. Litsan, 124 Pac. 968; 970.

20 Cyc. 656, 407, 408.

Smith v. Ried, 134 N. Y. 568.

The appellee as trustee therefore represents all the creditors of the Trading Company, bankrupt, which is a creditor of the other corporation Packing Company, insolvent; and the appellee as trustee represents all the bankrupt's creditors, regardless of whether they were such creditors on January 6, 1914, and may recover property conveyed in fraud of creditors for the equal

benefit of all the creditors, and not simply for those existing at the time the transfer (assignments) was made.

“Under Sec. 70a, B. A., the trustee of the estate is vested with the title of the bankrupt, including all property transferred by him in fraud of creditors, and property which, prior to the filing of the petition, he could by any means have transferred, or which may have been levied upon and sold under judicial process against him.

“Under Sec. 70e, of the same act, the trustee may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and he is given authority to recover the property in the hands of any one not a bona fide holder for value. * * *

“Under the bankruptcy act, when the conveyance was set aside, the lien or attachment being within four months of the bankruptcy proceeding, the bankrupt being then insolvent, * * * it (the lien) became good under the provisions of the bankruptcy act for the benefit of all the creditors of the estate.”

Globe Bank v. Martin, 236 U. S. 288, 35 S. C. 377, 59 L. ed. 583, at 587, 588, 590.

Same case, 193 Fed. 840, at 847, 848 (6. C. C. A.)

See also:

In re Farmers Co-operative Co., 202 Fed. 1008, at 1009, 1010.

In re Kobler, 159 Fed. 871, at 874 (6 C. C. A.)

We will hereinafter discuss the proposition that the appellant is not a bona fide holder for value.

(c) Trading Company was insolvent on January 6, 1914.

The definition of insolvency as laid down by the Bankruptcy Act of 1898, as amended 1910, Sec. 1 (15), is as follows:

“A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he might have conveyed, transferred, concealed or removed with intent to hinder, delay and defraud creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.”

The evidence (Pl. Ex. 67 and 67a; P. R. pp. 175, 176, 281, 289, 340, 341, 344; Kirberger's and Jaegar's testimony) conclusively shows, without any contradiction in the record, that the Trading Company was insolvent on January 6, 1914, at the time of making the two assignments to Kendall and Sanborn, and that its liabilities were then \$21,469.33 and its assets \$14,312.00. The trial court in its opinion (P. R. p. 157) found that it was practically insolvent, or at least was made so by the two assignments. However, we respectfully submit that under the bankruptcy law, appellant to avoid the consequences of the assignment made on January 6, 1914, by the Trading Company, could not compute the value of the property so conveyed in arriving at its assets and in ascertaining whether the aggregate of its property, at a fair valuation, was sufficient to pay its debts.

Lansing Boiler Works vs. Ryerson, 128 Fed. 703.
In re Crenshaw, 156 Fed. 638.

It is also a well established doctrine that, in creditors' suits to set aside fraudulent conveyances, the property retained must, at a fair valuation, be clearly and amply sufficient to satisfy the creditors' claims.

20 Cyc. 459.

(d) Fraud may be inferred, and will be presumed if the necessary result of the act is to place the debtor's

property beyond the reach of legal process so as to delay creditors.

While the learned trial court, in its opinion, held that there was no actual fraud, it found that the Trading Company received no consideration for the assignments and did not authorize the same. Inasmuch as the assignments left the Trading Company insolvent and without sufficient assets to pay its debts and beyond their reach by legal process, it will be presumed that the assignment was made with a fraudulent intent.

Crawford v. Beard, 12 Ore. 454, 8 Pac. 537.

To the same effect see:

Elfelt v. Hirsch, 5 Ore. 255.

Fleischman v. Bowser, 62 Fed. 259.

Thomas v. Crane, 73 Fed. 327.

In re Minard, 156 Fed. 377.

Manufacturing Co. vs. Standard & Co., 131 Fed. 217.

In re Salmon, 143 Fed. 400.

Johnson vs. Wald, 93 Fed. 640.

In re Wright Lumber Co., 143 Fed. 1013.

Toof vs. Martin, 80 U. S.—, 20 L. ed. 481, 13 Wall. 40 at 51.

In re Gilbert, 121 Fed. 953.

20 Cyc. 453.

(e) Kirberger, Kendall and Sanborn knew Trading Company was insolvent.

The evidence conclusively shows that Kirberger, who was president, manager and a trustee of the Trading Company, knew, prior to January 6, 1914, that the Trading Company was insolvent, unable to pay its debts

in the usual course of business, and that at least one suit had theretofore been instituted against it by a creditor for the collection of his claim (P. R. pp. 227, 341, 344; Pl. Ex. 67 and 67a); and furthermore that Kendall and Sanborn were likewise informed of the insolvency of the Trading Company, and had reasonable cause to believe it was insolvent (Pl. Ex. 49, 58 and 58b).

(f) No consideration for assignments of January 6, 1914.

There was no adequate, genuine consideration to the Trading Company for the assignments of January 6, 1914, and the learned trial court so found (Op. P. R. p. 157). There was nothing received by the bankrupt Trading Company to take the place of its assets so assigned—nothing received by it upon which its creditors could levy to satisfy their claims against it. Even appellant, we submit, is unable to disclose any consideration moving to the Trading Company except \$1.00, which is such a grossly inadequate consideration that it shocks the conscience and furnishes satisfactory, decisive evidence of fraud.

Archer v. Lapp, 12 Or. 202.

Even conceding for the sake of argument that the Trading Company, and not Kirberger, received an option, and that that option contained the most favorable terms possible for appellant to claim it contained under the letter of March 21, 1914 (Deft. Ex. E), instead of containing the terms of the actual and *only* writing on January 6, 1914 (Pl. Ex. 59, 60, 61; P. R. pp. 324, 383), still there was nothing which inured to the benefit of the Trading Company.

There was an absolute lack of a genuine, adequate consideration, and the want thereof makes the assignments fraudulent.

Hesse v. Barrett, 41 Or. 203, 68 Pac. 751.

Baldwin v. Johnson, 14 Or. 554, 13 Pac. 434.

Likewise, the want of a valuable consideration renders the assignments fraudulent.

Flynn v. Baisley, 35 Or. 218.

Scoggin v. Schloath, 15 Or. 380.

Under the evidence, we submit that the burden of proof was upon appellant to prove that Kendall and Sanborn were bona fide purchasers for value, and without notice, and that it entirely failed to sustain that burden.

Webber v. Rothchild, 15 Or. 385.

Stubling v. Wilson, 50 Or. 284.

II.

THE CREDITORS OF A CORPORATION HAVE A CLAIM UPON ITS ASSETS OF WHICH THEY CANNOT BE DEPRIVED BY AN UNAUTHORIZED ACT OF THE CORPORATION OR OF ITS OFFICERS, ALTHOUGH SUCH OFFICERS MAY OWN ALL THE STOCK IN THE CONCERN.

(a) The assignments were not the act of the Trading Company.

The trial court found, in its opinion, that there was no consideration moving to the Trading Company for the assignments of January 6, 1914, and that they were

not made by authority of its board of directors (P. R. p. 157). Such findings were clearly warranted under and supported by the evidence, and, if the burden of proving the want of such authority is upon appellee, as contended by appellant, then appellee certainly met that burden with a clear, uncontradicted preponderance of the evidence (P. R. pp. 227, 229, 234; Pl. Ex. 62). Furthermore, it is apparent from the circumstances under which the transactions took place that Kendall and Sanborn knew that Kirberger had not been authorized to make such assignments (P. R. pp. 227, 229, 346, 347, 393).

However, we earnestly maintain that the burden of proof was upon the appellant to show that the Trading Company had either authorized or else ratified and acquiesced in the assignments.

Crawford v. Albany Ice Co., 60 Pac. (Or.) 14.

Harding v. Idaho-Oregon Co., 110 Pac. (Or.) 413.

(b) Kirberger had no implied authority or power to make the assignments for the Trading Company.

Kirberger did not, in consequence of being the owner of all but two shares of the total stock of the Trading Company (P. R. pp. 210, 211, 242, 243, 244), acquire the right to act for the corporation, or as the corporation independently of the directors. In fact, even if he had owned all the stock, the existence, relation and business methods of the corporation would continue. This doctrine is supported by numerous authorities.

Cook Corp. 6th Ed. Vol. 3, Sec. 709, pp. 2227, 2228.

- Potts v. Wallace, 146 U. S. 689, 36 L. ed. 1135.
 Mays v. Foster, 13 Or. 214.
 Parker v. Bethel Hotel Co., 96 Tenn. 252.
 Isham v. Bennington Iron Co., 19 Vt. 230.
 Wheelock v. Meulton, 15 Vt. 519.
 Buffalo, Etc. Co. v. Medina Etc. Co., 162 Ky. 67.
 Hopkins v. Roseclare Lead Co., 72 Ill. 373.
 Allemong v. Simmons, 124 Ind. 199.
 Donaghue v. Indiana Etc. Ry., 72 Iowa 750.
 Button v. Hoffman, 61 Wisc. 20.
 Bank v. Construction Co., 97 Tenn. 1.
 Harrington v. Connor, 51 Nebr. 214.
 Lawson v. Black Etc. Co., 44 Wash. 26, 86 Pac.
 1120.

The principle seems axiomatic, as neither a person nor all of the natural persons who compose a corporation or who own its stock and control its affairs, are the corporation, and even though a single individual compose a corporation he is not himself the corporation; in such cases the individual is one person and the corporation is another person.

7 Ruling Case Law, p. 26.

Furthermore, a single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity.

Cook Corp., 6th ed. Vol. 3, Sec. 709, p. 2225.

Sargent v. Am. Bank & Trust Co., 154 Pac.
 (Or.) 759 at 765.

And a deed of corporate property by a person who owns all the stock does not convey good title.

Cook Corp. 6th Ed., Vol. 3, Sec. 709, p. 2226.

(b) The assets of a corporation constitute a trust fund for the payment of the debts of its creditors.

The doctrine that creditors of a corporation have a right to look to its assets for the payment of their claims against it is so thoroughly established that no argument is required.

7 Ruling Case Law, Sec. 169, p. 199; Sec. 561, p. 573.

Chicago, Etc., R. R. Co., v. Howard, 7 Wall. 392, 19 L. ed. 117, at 120.

10 Cyc. 1266, 1267.

Leathers v. Janney, 6 L. R. A. 661.

From the principles announced in subsections A and B, it logically follows that the creditors of a corporation have a claim upon its assets of which they cannot be deprived by an unauthorized act of the corporation or of the corporation's officers, although such officers may own all the stock in the concern. Moreover, the conclusion reached is amply supported by weighty authority.

Stewart vs. Gould, 36 Pac. (Wash.) 277.

Mill Co. vs. Lumber Co., 52 Pac. (Wash.), 1067 at 1070.

In re Haas Co., 131 Fed. 232 (7 C. C. A.).

Germania Etc. Co. vs. Boynton, 71 Fed. 797 (6 C. C. A.).

Bank vs. Bank, 227 Fed. 714 at 715.

(c) Neither Kirberger on behalf of the Trading Company, nor the latter itself, could waive the lien of its creditors to look to its assets, i. e., the debt of \$8582.21 for the payment of their claims against the company, nor would any such waiver or estoppel therefrom operate against the appellee as trustee in bankruptcy.

Car Co. v. Transp'n, 35 L. ed. 68 (139 U.S.)

In this connection, it should be borne in mind that appellee is the trustee in bankruptcy of the Trading Company, and is seeking to obtain possession of assets transferred by that company in fraud of its creditors; that those assets consisted of a claim against the Packing Company, which later conveyed all its assets to the appellant in fraud of the Packing Company's creditors, particularly the Trading Company.

"Title is vested generally in the trustee in and to all property transferred by the bankrupt in fraud of his creditors at any time; and this undoubtedly was intended to mean any past fraud whereby property which should rightfully be applied to the payment of the debts owing by the bankrupt could be followed and seized for that purpose."

In re Kobler, 159 Fed. 871.

We maintain that there is no waiver or estoppel by reason of any of Kirberger's acts against the Trading Company, and particularly as against the latter's trustee in bankruptcy.

WAIVER.

When counsel for appellant admits the rule laid down in the case of Williams vs. Commercial National Bank, 49 Ore. 498, "that a debtor corporation cannot dispose of its entire assets to the prejudice of its creditors and that such grantee must take notice that it takes the assets subject to the lien of the creditors," he in substance, admits the whole case and the liability of appellant in this suit. But he attempts to slip out from under such liability by contending that the Trading Company waived its lien upon the assets of the Packing Company through Kirberger, a majority stock-

holder in the Trading Company, whom counsel for appellant has the temerity to claim had full authority to make such waiver.

(a) Now Kirberger was not the Trading Company, even though he was President and General Manager and owned a great majority of the stock, as the corporation has an existence entirely separate and distinct from its shareholders, with power to transact business, invite credit, incur obligations and discharge them entirely distinguished from its individual shareholders, and their power to transact business, and Kirberger could not use the assets of the Trading Company for his own benefit.

(b) And even if Kirberger had owned all the stock in the corporation, which he did not, since the laws of Washington required at least two stockholders, Kirberger could not by any unauthorized act as a majority stockholder and officer, deprive the creditors of the Trading Company of their claim upon its assets by an attempted waiver.

(c) Then, at the time of the attempted assignment of the Trading Company account to Sanborn and Kendall, the Trading Company was really insolvent, and as the attempted assignment was without the authority of the Trading Company, it was therefor void as to the trustee in bankruptcy. Furthermore, there was no consideration for such assignment.

Now counsel for appellant quotes several authorities alleging that they support his contention that there was a waiver but a careful analysis of these cases shows that in *Pritchard vs. Mullhall*, 118 N. W. 45, an Iowa case

decided October 28, 1908, there, the defendant had accepted and held in his own possession, an abstract of title to land, and then refused to carry out his contract, and the Iowa Supreme Court held he had waived objections to the title of the land by keeping the abstract and not making objections to the same. This was between individuals only and clearly not applicable here, since here there was an attempted assignment of an insolvent corporation's assets to another corporation. In *Currie vs. Continental Casualty Company*, 126 N. W. 165, another Iowa case, decided May 3, 1910, it was held that letters passing between plaintiff and defendant should have been offered in evidence for the jury to determine whether there was a waiver, as it was to be a finding of fact, which case is not applicable here. In the case at bar this question was submitted to the Court upon the evidence adduced, and the Court held against the appellant's contention as the President and General Manager of the corporation had no authority whatever to waive the rights of the corporation, its stockholders and creditors. In *Alexander vs. North Carolina Savings and Trust Company*, 71 S. E. 70, a North Carolina case, decided May 3, 1911, the Court held that "a waiver is an intentional relinquishment of a known right," but here Kirberger did not possess a known right that he could waive any claim of the corporation itself or its creditors, to the assets of the Trading Company, and particularly he could not have waived such claim to the assets of an insolvent corporation. In *List & Son Company vs. Chase*, 88 N. E. 122, an Ohio case, decided March 9, 1909, the Court held "that a

waiver must be intentional, that is, with knowledge of the facts and the party's rights," and in the case at bar Kirberger had no right or authority to act for the Trading Company, and particularly he had no right to act in the matter of waiving any claim or lien against the assets of the Trading Company then held or afterwards obtained by the creditors of the Trading Company or the trustee in bankruptcy. In *Connecticut Casualty Company vs. Bridges*, 114 S. W. 171, a Texas case, decided November 27, 1908, it was held "that a waiver may be inferred from any circumstances that show that both parties understood that payment of the premium would not be required at a specified date," but here both parties did not have any such understanding for the reason that Kirberger was not the Trading Company and had no authority to represent it in waiving any claim or lien held by creditors against its assets. In *First National Bank of Brooklyn vs. Gridley*, 98 N. Y. Supp. 451, a New York case, decided April 20, 1906, the Court held that "an express waiver is where there is an agreement between the parties to that effect," and counsel for appellant claims that Kirberger made an express waiver for the Trading Company, but who were the parties in this case at bar? Why, the Trading Company, not Kirberger alone, even if he did own most all the stock. In *Kennedy vs. Maury*, 66 S. E. 31, a Georgia case, decided November 9, 1909, the Court held that "waiver and estoppel are very different matters," and also held that "waiver depends upon what one himself intends to do," but here it could not and was not left with Kirberger to determine what the

Trading Company itself or its creditors would or intended to do. In *Johnson vs. Spencer*, 96 N. W. 1041, an Indiana case, decided January 3, 1912, the Court held that "the term waiver generally implies an intention on the part of a *person possessing some right under a contract or the law* to relinquish it for the benefit of another. Waiver is ordinarily personal." Now, in the case at bar, Kirberger had no right whatever under any contract or the law to waive any claim or lien of the Trading Company or its creditors to the assets of the Packing Company, and particularly when the Trading Company was insolvent. In *Loftis vs. Pacific Mutual Life Insurance Company*, 114 Pac. 134, a Utah case, decided January 18, 1911, the Court held that "a waiver operates as an estoppel on the party who waives," but in the case at bar there was certainly no waiving of their claim by the Trading Company, or its creditors, and Kirberger had no authority to waive for them. In 40 Cyc. 252, et seq., referred to by counsel for appellant, it is plainly set forth that in order to waive a claim or lien, the one attempting to make such waiver, must have full right or authority to do so, which Kirberger did not have.

In all the authorities cited by counsel for appellant on page 33 of his brief, he fails to consider the established facts that the Trading Company was insolvent and that neither the Trading Company nor its creditors had authorized Kirberger to waive their claims or liens against the assets of the Packing Company, and no unauthorized acts of Kirberger as President and General Manager of the Trading Company, could estop the

Trading Company, its creditors, or the trustee in bankruptcy, from enforcing their claims against the appellant holding the assets of the Packing Company. In those authorities quoted, a close examination of the same shows that the waiving party there was solvent, had full authority to make waiver of rights or an individual making waiver of his own rights and none of them are applicable to the case at bar.

It is a recognized principle that any one may waive a right intended for *his own benefit*, if it can be relinquished without detriment to others, but Kirberger had no right or authority to waive any lien or claim of the Trading Company, or its creditors, against the assets of the Packing Company, and there is no bona fide contention by appellant that the Trading Company itself, or its creditors, waived their claim against the assets of the Packing Company. Furthermore, there cannot be a waiver unless one has full knowledge of the material facts, which the directors and creditors of the Trading Company did not have.

10 Cyc. 908, 935, 936.

Bank of U. S. vs. Dunn, 8th L. Ed. 319.

Potts vs. Wallace, 36th L. Ed. 1141.

Thompson vs. McKee, 37 N. W. 369.

Reid vs. Field, 1. S. E. 395.

Knettle vs Newton, 78 Amer. Dec. 187.

Phelps vs. Phelps, 22 Am. Rep. 151.

Benson vs. Metropolitan Life Insurance Co., 144 S. W. 122.

Washington Code, Secs. 3677, 3679 and 3686.

Sargent vs. Am. Bank & Trust Co., 154 Pac. (Or.) 765.

ESTOPPEL.

Appellant contends that Kirberger bound the Trading Company and its creditors by his alleged agreement with the appellant that the Trading Company would not enforce its claim against the assets of the Packing Company, in such a way that the Trading Company, its creditors, and the Trustee in Bankruptcy of the Trading Company, are estopped from enforcing such claim against this appellant and counsel for appellant contends that the Court below entirely overlooked the proposition that a creditor of an insolvent corporation has the right to state to an intending purchaser of its assets that he will not insist upon his claim being paid by such purchaser. But it will be found upon a careful examination of the District Court's carefully prepared opinion handed down in this case that counsel for appellant argues from false premises. The Trading Company was one of the creditors, not Kirberger, and Kirberger had no authority to bind the Trading Company and its creditors. And while Kirberger was President and General Manager of the Trading Company, he was not the owner of all the stock, and even if he was the owner of all the stock in the Trading Company, the creditors of the Trading Company cannot be deprived of their claim upon its assets by his unauthorized act as an officer, and this is true as to the Trustee in bankruptcy, although he may only be representing creditors who became such after the date of the assignment of the claims.

The travesty upon justice which counsel says would happen in case appellant is required to pay the \$6,688.87

extra, and interest from May 12, 1914, as it was decided by the United States District Court for Oregon after the fullest consideration and investigation, that it should do, loses its force and appears to be somewhat hypercritical, when it is shown in the testimony that appellant made a clear profit on the assets of the Packing Company of nearly \$14,000.00 each year for two successive years after it obtained possession of them.

Furthermore, the assumption by counsel for appellant that Kirberger himself constituted all the stockholders of the Trading Company, and that the signing by one director if that was Kirberger was the same as if all the directors had signed, is absolutely incorrect, for in the State of Washington under whose laws the Trading Company was organized and existed, the law requires at least two stockholders and two directors or trustees.

And even though they had all signed, still it would not have been good as against the creditors of the Trading Company or the Trustee in bankruptcy of said company.

Stewart vs. Gould, 36 Pac. 277.

In re Hass Company, 131 Fed. 232.

Germania Safety V. T. Co. vs. Boynton, 71 Fed. 197.

2nd Thompson on Corporation, Sec. 1241.

Pacific State Bank vs. Coates, 205 Fed. 618.

Williams vs. Commercial National Bank, 49 Ore. 492.

Washington Code 1910, Secs. 3677, 3679, 3686.

Transcript of Record, pp. 152, 160.

Transcript of Record, pp. 295, 297.

III.

A CORPORATION HOLDS ITS PROPERTY SUBJECT TO THE PAYMENT OF THE CORPORATE DEBTS AND CANNOT SELL OR IN ANY WISE ALIEN ITS PROPERTY TO THE PREJUDICE OF ITS CREDITORS SO AS TO HINDER, DELAY OR DEFRAUD THEM IN THE COLLECTION OF THEIR DEBTS OWING BY IT, AND WHEN THE CORPORATION SELLS OR TRANSFERS ITS ENTIRE PROPERTY TO A PURCHASER, KNOWING THE FACT, THE LATTER IS CHARGED WITH KNOWLEDGE THAT THE PROPERTY IS SUBJECT TO THE CORPORATE DEBTS, AND EQUITY WILL ALLOW THE CORPORATE CREDITORS TO FOLLOW THE PROPERTY INTO THE HANDS OF PURCHASERS FOR THE SATISFACTION OF THE CLAIMS.

(a) Corporate assets are a trust fund for its creditors.

Appellant concedes this doctrine as well as the extension thereof, and admits that where one corporation sells its entire assets to another corporation, and thus practically ceases to exist, without having paid its debts, the purchasing corporation takes the property subject to an equitable lien or charge in favor of the creditors of the selling corporation, and evidence of fraudulent intent or want of consideration is not necessary, and the purchasing corporation takes such assets with notice of

such claims and subject to equitable liens. (Appellant's brief, p. 32.)

It is undisputed that on May 11, 1914, upon offer of appellant (P. R. p. 256; Deft. Ex. . .), the Packing Company conveyed by bill of sale (Pl. Ex. 64) its entire assets to appellant for an alleged consideration of \$72,621.01; that not one cent of money actually changed hands, but the transfer was entirely a matter of book entries (P. R. pp. 258, 265, 266, 401, 403, 404); that the only consideration was the assumption of a portion of the liabilities of the Packing Company by appellant (P. R. p. 351), all or practically all of which liabilities were either owing to Kendall, Sanborn, Sanborn & Son, or appellant, or had theretofore been guaranted or endorsed by them (P. R. pp. 252, 253, 305, 374, 377, 379); that the Packing Company had nothing whatever to do with the distribution of said alleged consideration, but that the same was distributed by appellant itself, and that as a matter of fact thousands of dollars were not paid until the fall of 1914 (Sanborn's testimony; Deft's. Ex. M), and several thousand dollars had not been paid at the time of the trial (P. R. pp. 368, 371, 372). In this connection it is interesting to note that appellant admits that it made profits off the operation of the Packing Company's plant in 1914 of \$13,911.83, and in 1915 of \$13,893.36 (Deft. Ex. B). It is further undisputed that the Packing Company immediately ceased business; that Kendall and Sanborn knew prior to and at the time of the sale that the Packing Company would be obliged to go out of business (P. R. pp. 315, 399, 402), and also knew that the \$8582.21 account was a just debt against

the Packing Company in favor of the Trading Company (P. R. p. 441); that they knew all the circumstances of the assignment of January 6, 1914, being participants therein. It is admitted that Kendall and Sanborn were stockholders in the Packing Company, having control of the majority stock; that they owned all the stock of the appellant (P. R. pp. 256, 437); that they were directors in each concern; that Sanborn was secretary of the Packing Company and president and manager of appellant, and that they, and no one else, acted for and represented the appellant in the transaction (P. R. pp. 256, 312, 313, 379). Appellant contends and the trial court found (Op., P. R. p. 154) that the Packing Company was insolvent at that time.

(b) Conveyance was not made in due course of business and operates as a fraud.

It is therefore apparent that the sale was not made in due course of business, and that it was not necessary to disclose a fraudulent intent or want of consideration, and that the appellant took such subject to the lien of the Packing Company's creditors.

Williams v. Bank, 90 Pac. (Or.) 1012, at p. 1015.

White v. Bank, 5 L. R. A. N. S. 520—Note.

(c) Appellant took Packing Company's assets with notice.

Inasmuch as Kendall and Sanborn, who were officers of and owners of the entire stock of the appellant, it cannot be contravened that, inasmuch as they were acting for and were the sole representatives of the appellant, there being no contention that they were not so

authorized to act for the latter, that appellant had notice of all of the inequities of the conveyance.

“It is a well settled principle that notice to an officer or agent of a corporation, in due course of his employment and in respect to a matter within the scope of his authority, or apparent authority, concerning affairs of such character that it becomes his duty to communicate the information to it, is notice to the corporation, whether he imparts to it such information or not.”

Dillard v. Mining Co., 94 Pac. (Or.) 966, 968.
7 Ruling Case Law, pp. 656, 658.

(d) Property in hands of appellant will be subjected to the debts of the Packing Company.

1. From the undisputed evidence, it cannot be seriously controverted that the conveyance is well within the rule that when a corporation sells its entire property and rights to a purchaser knowing the fact, equity will in proper cases subject the property in the hands of the purchaser to the payment of the debts that it owes.

Chicago, etc., R. R. Co. v. Howard, 7 Wall.
392, 19 L. Ed. 117, at 120.

10 Cyc. 1266, 1267.

7 Ruling Case Law, Sec. 561, p. 573; Sec. 169,
p. 199.

Boyes v. Burke Mining Co., 106 Pac. (Wash.)
475.

Leathers v. Janney, 6 L. R. A. 661.

Morrison v. Am. Snuff Co., 79 Miss. 330, 30
So. 723.

Atlantic B. R. Co. v. Johnson, 56 S. E. 482; 11
L. R. A. N. S. 1119.

Laughin v. Furn. Co., 118 Ill. Ap. 36.

Fogg v. St. L. H. & K. R. R. Co., 17 Fed. 871.

Sharples v. Creamery Co., 78 Neb. 795, 111 N. W. 783; 11 L. R. A. N. S. 863.

Burton v. Salt & Lumber Co., 190 Fed. 262.

Nelson v. Soca Pub. Co., 178 Fed. 136.

In re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33.

2. Moreover, there is a further cogent principle as to why said conveyance is void, and that is because the evidence shows that the consideration of it was entirely to pay liabilities either owing to Kendall, Sanborn, Sanborn & Son, or appellant, or liabilities which they had guaranteed or endorsed (P. R. pp. 252, 253, 305, 347, 377, 379), and at the same time Kendall and Sanborn were stockholders in the Packing Company, having control of the majority stock; they owned all the stock of the appellant (P. R. pp. 256, 437); they were directors in each concern; and Sanborn was secretary of the Packing Company and president and manager of appellant, and they, and no one else, were acting for and represented appellant (P. R. pp. 256, 312, 313, 379).

“Contracts made between corporations which are controlled by same directors will be subjected to severe judicial scrutiny and the courts will set them aside on the least appearance of unfairness.”

Hutchinson v. Sutton Mfg. Co., 57 Fed. 998.

In re McCarthy Portable Elevator Co., 196 Fed. 247; 201 Fed. 923.

10 Cyc. 818.

The leading case on this proposition is Sutton Mfg. Co. vs. Hutchinson, 63 Fed. 496. Briefly the facts were

as follows: In forenoon mortgagor filed mortgage covering entire business to Sutton Mfg. Co. Mortgage given to secure drafts drawn by mortgagor on mortgagee. Mortgagor was insolvent at time of giving transfer. Insolvency known or ought to have been known to mortgagor's president, and presumed to have been known by his codirectors. Mortgagor intended to suspend business operations. In afternoon mortgagor made and filed assignment to appellee. Assignment purports on face to have been made because of inability of mortgagor to meet demands of its creditors. Two directors of mortgagor were also directors of the mortgagee; the presidents of each were the same person; the secretaries of each were the same person; the secretary in one was also its treasurer; the president in one was also its treasurer; the stockholders of the mortgagor were all stockholders of the mortgagee, and, with their relatives, owned all the stock in the latter. Hutchinson, assignee, sued to set mortgage aside.

The Seventh Circuit Court of Appeals, speaking through that learned jurist, Mr. Justice Harlan, said at pages 499, 500, 501 and 502 (63 Federal):

"It is quite true that the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors; and such a corporation, so long as it is in the active exercise of its functions, may, if not restrained by its character or by statute, exercise as full dominion and control over its property, having due regards to the objects of its creation, as an individual may exercise over his property. But when it becomes insolvent, and has no purpose of continuing business, the power to sell, dispose of, and transfer its estate is not altogether without limitation.

“* * * a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. * * *

“Entirely different considerations come into view when an insolvent corporation, having no expectation of continuing its business, and recognizing its financial embarrassments as too serious to be overcome, mortgages its property to secure a debt previously incurred by one of its directors, or, in a general assignment of all of its property, gives him a preference. To a general assignment by a private corporation for the equal benefit of all its creditors, including directors, no objection could be made, because it recognizes the equal right of creditors to participate in the distribution of the common fund. Such an assignment, Lord Ellenborough said in *Pickstock v. Lyster*, 3 Maule & S. 371, 375, is to be referred to an act of duty rather than of fraud, and is an act by the assignor that arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors.”

See also:

Brown & Co. v. Sanford F. & T. Co., 44 Fed. 231.

Lippincoat v. Shaw Carriage, 25 Fed. 577.

Hutchinson v. Sutton Mfg., 57 Fed. 998.

In re Salvator Brewing Co., 183 Fed. 910.

Asheville Lumber Co. v. Hyde, 172 Fed. 733.

Bank v. Power Co., 219 Fed. 591; aff. 224 Fed. 39 (9 C. C. A.).

Butterfield v. Woodman, 223 Fed. 956, at 960.

The facts in the case at bar are equally as inequitable as were the facts in *Sutton Mfg. Co. vs. Hutchinson*, *supra*, and we earnestly maintain more so, in that: Kendall and Sanborn, the representatives of appellant, knew the circumstances under which the Trading Company had been defrauded of its claim against the Packing Company; they were the prime movers in the several transactions; they knew Kirbgerger was without authority to make the assignments.

Appellant, however, seeks to overcome the doctrines and principles just announced by contending that Kirbgerger on behalf of the Trading Company waived any right that the Trading Company had as a creditor of the Packing Company to subject the latter's assets to the former's claims, and that the Trading Company, as well as appellee, are thereby estopped to subject those assets to said claim. While we do not concede for a moment that the Trading Company could be estopped by the unauthorized act of Kirbgerger, in a matter where the Trading Company received no benefit and in no wise led Kendall, Sanborn or appellant to act to their own disadvantage, yet assuming for sake of argument that the Trading Company is so estopped, the fallaciousness of the contention that the Trading Company's creditors or trustee is estopped is at once apparent. The Trading Company would then be contended to have aliened its assets without consideration, to have placed them beyond the reach of its creditors, and, even though no actual intent to defraud had existed, the very result of the act would be to hinder, delay and defraud its creditors and fraud will be presumed.

If such a transaction is lawful, the bankruptcy act would be rendered futile, and whenever a corporation found itself insolvent all that would be necessary to be done to prevent the bankruptcy court from acquiring possession of any of its assets would be to have a majority stockholder or an officer assign them away, and waive any right to reclaim them, or, if the assets consisted of bills receivable from other corporations, to assign those bills away and waive any right that the bankrupt corporation might have as a creditor to obtain payment of its claim out of the assets of those other corporations in case it should become necessary to enforce such payment—and all this, as appellant urges, without consideration and even though the majority stockholder or officer was unauthorized to make any such assignment. However, in this case it is not the bankrupt Trading Company but its trustee in bankruptcy who is seeking relief, and, as stated in the cases which we have cited under division I, the Trustee does not stand in the shoes of the bankrupt but can enforce liens and claims which it might be estopped from enforcing.

(e) Trading Company's deed of May 11, 1914, is invalid.

At the same time that the Packing Company conveyed all its assets to the appellant, the latter took the precaution (P. R. pp. 393, 405 and 406) to have Kirberger, the Packing Company, and the Trading Company execute a deed (Pl. Ex. 65) to appellant for an alleged consideration of \$10.00 of a certain tract of land about one mile southeast of Kake, Alaska, for which the Trading Company later in November, 1914, received

patent from the United States (Pl. Ex. 9). The Trading Company did not authorize said deed and received no consideration as a matter of fact (P. R. p. 262), and was at said time insolvent. This is the same tract which was conveyed by Burwell to the Trading Company, by the latter to the Packing Company (P. R. pp. 203, 204), and the consideration of \$1750.00 for which was charged back against the Trading Company on the books of the Packing Company at the direction of Sanborn (P. R. pp. 221, 261, 405) until such time as patent was received by the Trading Company from the United States. Neither the Packing Company nor appellant has paid the Trading Company \$1750.00 or any other sum for said tract (P. R. pp. 400, 405). This is the tract now occupied by appellant (P. R. pp. 204, . . .). The \$1750.00 is the item, which with the item of \$8,582.21 makes the \$10,333.31. (P. R. pp. 221, 225, 226, 294, 295.)

Under the doctrines and principles heretofore announced, and particularly those under division II hereof, this deed was clearly invalid. It is important, however, to bear in mind that the assignment of January 6, 1914, was of an account for goods, wares and merchandise furnished and moneys advanced, amounting to \$8582.21, and that this \$1750.00 was not included therein (P. R. pp. 225, 226, 294, 295); that at that time the Packing Company actually owed the Trading Company \$10,333.31, but that the \$1750.00 of that amount had been charged back, in fact, figuratively thrown to one side, at the direction of Sanborn (P. R. pp. 221, 261, 405), and that it has never been paid

(P. R. pp. 400, 405); and that by the deed (Pl. Ex. 65) the appellant acquired the tract without any payment therefore; that the Trading Company had prior to the various transactions involved in the suit made application for patent to the tract, and that this patent was granted to the Trading Company by the United States after the occurrence of the transactions in suit and in November, 1914 (Pl. Ex. 9).

Before closing, we shall refer briefly to appellant's brief on certain contentions as to the evidence.

TRADING COMPANY INSOLVENT.

The statement of counsel for appellant that the books of the Trading Company show clearly that it was entirely solvent, is like many other statements of appellant, absolutely incorrect and misleading, because established on false premises, for the assets of the Trading Company, exclusive of the \$8582.21 claim Kirberger attempted to assign to Sanborn and Kendall, amounted to only \$14,312.00, and *not* \$23,849.54 as claimed by appellant, while the liabilities claimed by appellant, amounted to \$21,469.33, leaving the liabilities \$7157.33 in excess of its assets. (Appellant's brief, pp. 101 to 106; P. R. pp. 175, 176, 281, 289, 341; Pl. Ex. 67 and 67a.)

In one breath counsel for appellant contends that appellee did not have any witnesses testify as to the value of the assets of the Trading Company, and in the next, refers to a part of the Transcript of Record where witnesses did so testify for appellee, but counsel fails to call attention to the testimony of Kirberger at 452 and 453 of the record where there was introduced in evi-

dence plaintiff's exhibit 67a, showing liabilities of the Trading Company amounting to \$21,469.33, upon which basis it is clearly shown that the liabilities of the Trading Company exceeded the assets \$7,157.33. And all this testimony of Kirberger and Jaeger is absolutely uncontradicted in any way whatever.

Thus the Trading Company was clearly insolvent after the transfer of the \$8,582.21 claim to the Packing Company, and the rule is thoroughly established that if the transfer of the assets of a corporation result in its becoming insolvent on account thereof, and there is not sufficient to pay its debts, then if the assets of the corporation are sold and transferred to another person or corporation, such assets are subject and liable to the claim and lien of the corporation's creditors.

CLAIMS FILED AGAINST ASSETS OF TRADING COMPANY.

As to the claims filed against the bankrupt, Trading Company, we respectfully refer the Court to plaintiff's Exhibits 1 and 2, and the testimony of plaintiff's witnesses, Kirberger and Jaeger shows that the claims filed amounted to \$21,469.33 and it was clearly shown in the testimony that the assets only amounted to \$14,312.00, thus, leaving a deficit of \$7,157.33, and the property of the Packing Company transferred to appellant, the Sanborn Cutting Company, is therefore liable for the claims of creditors of the Trading Company.

Transcript of Record, 175, 176, 281 to 289, 341 and 452 to 453.

JUDGMENT.

As to the indebtedness of the Packing Company to the Trading Company at the date of the transfer of the assets of the Packing Company to appellant, it was not only the \$8,582.21, but also the \$1,750.00 due for the canning site at Kake, Alaska, for which appellant had received title from the Trading Company, admitted by defendant's witness Sanborn, and the District Court correctly counted in this amount due for the site.

Transcript of Record, 405 to 407, 221, 261, 262.

INTEREST.

The contention of counsel for appellant as to interest on the judgment is certainly incorrect for the reasons that; (1) the contract between the Trading Company and the Packing Company whereby wares, goods, merchandise and money were furnished the Packing Company at Kake, Alaska, was made in Alaska, where interest begins to run, as expressly allowed by statute, "on money due upon the settlement of matured accounts from the day the balance is ascertained" (and the Oregon statute is exactly the same), which, in this case, was January 6, 1914; (2) this account of \$8,582.21 was conceded by appellant to have been the money due upon the settlement of a matured account ascertained on January 6, 1914, and on such accounts interest is expressly allowed by both the statutes of Alaska and Oregon and; (3) the judgment of the Alaska Court for \$10,333.31 which included this \$8,582.21 account and \$1,750.00 admitted by appellant to be due for the canning site rendered on

August 27, 1915, was consolidated with the case brought in the District Court at Portland, and under the law and authorities the District Court could not do otherwise than allow appellee interest at least from May 12, 1914, and while the rate allowed was 6 per cent, appellee contends that he is entitled to 8 per cent, the Alaska rate.

Sec. 684, Compiled Laws of Alaska, 1913.

Sec. 6028, Lords Oregon Laws.

Hemple v. Raymond, 144 Fed. 796.

ASSIGNMENTS XII AND XIII.

However, we make no response to appellant's assignments of errors XII and XIII, because appellant in its brief does not in any wise refer thereto, or furnish either reasoning or authorities as to any error contained in them; it being our understanding that appellant has thereby waived those assignments.

CONCLUSION.

In conclusion, first calling attention to the able opinion of the learned trial court (P. R. p. 152), we urge that the decree and judgment of the trial court should and ought to be affirmed and that the only modification which should be made is that appellee should have judgment for \$10,333.31, instead of \$6,688.87, with interest from January 6, 1914, on the following, among other, grounds:

1. The assignment of January 6, 1914 (Pl. Ex. 61), as well as the assignment of 125 shares of stock (Pl. Ex. 59), is null and void; that the same was unauthorized by and there was no consideration moving to

the Trading Company therefor; that its necessary result was to defraud the Trading Company's creditors, in that, it placed beyond their reach by legal process the assets of the Trading Company to which the creditors had a right to look for the payment of their claims; further, that it left the bankrupt without sufficient assets to pay its just liabilities, and that on said date the Trading Company was insolvent.

2. The conveyance of May 11, 1914 (Pl. Ex. 64), is null and void; that the same conveyed the entire assets to a corporation (appellant), who was not a bona fide purchaser for value, having knowledge that there were unpaid debts of the grantor (Packing Company), and that the grantor was going out of business; that the only consideration was the assumption of debts owing to or secured by the officers and stockholders of the grantee who were also officers and stockholders of the grantor; that the entire transfer was simply a matter of book entries.

3. That plaintiff is not limited to the rights of the bankrupt and is entitled to have payment made by appellant of the judgment amounting to \$10,333.31, which appellant recovered against the Packing Company, which judgment represents the account of bills receivable for \$8,582.21 plus the consideration of \$1,750.00, which has not been paid, for the tract of land which, although theretofore conveyed by the Trading Company to the Packing Company, was conveyed by the Trading Company, in a joint deed with Kirberger and the Packing Company, to appellant on May 11, 1914 (Pl. Ex. 65).

Appellant seems to feel that it and its officers have been charged with fraud and wrong-doing without any rhyme or reason therefor. However, it sometimes becomes necessary, even at the expense of much pain, to call a "spade" a "spade," and we feel that it is a sufficient response to appellant's cry that the evidence clearly shows that, be the transactions involved fair and honest or wrongful and fraudulent, at the conclusion of them the Trading Company and the Packing Company were both wrecked; that the Trading Company was later obliged to go into bankruptcy; that the Packing Company ceased doing business and its assets were entirely taken away. And, where do we find appellant and its innocent officers at that time? Appellant is found to own all the assets of the Packing Company, from the operation of whose plant it made profits in 1914 of \$13,911.83 and in 1915 of \$13,893.36, being interest of something over eleven per cent per annum on the entire paid in capital stock of the Packing Company plus its entire liabilities, conceding as argument that appellant paid them all.

In the light of the record and of the decisions cited, we earnestly maintain that no prejudicial error or injury was sustained by the appellant, and that it would be unfair, unjust and inequitable to permit it to prevail as against appellee. We submit that justice and equity are hand in hand in urging that the judgment and decree of the trial court be upheld and sustained, except to be modified by increasing the amount to \$10,333.31, and we respectfully pray that it be so ordered.

Respectfully submitted,

GUNNISON & ROBERTSON,
JAMES J. CROSSLEY,

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation,
J. E. WOODS and M. J. CHAPPELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

Filed

JAN 9 - 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation, J. E. WOODS and M. J. CHAPPELL,

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Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**[1*] Names and Addresses of Attorneys of
Record.**

GEO. F. SHELTON, Esq., of Butte, Montana,

FRED J. FURMAN, Esq., of Butte, Montana.

A. E. VERHEYEN, Esq., of Butte, Montana.

Attorneys for Defendants and Plaintiffs in
Error.

BURTON K. WHEELER, Esq., of Butte, Montana,

A. A. GRORUD, Esq., of Butte, Montana,

Attorneys for Plaintiff and Defendant in
Error.

Transcript on Removal.

*In the District Court of the United States, for the
District of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHICAGO,
MILWAUKEE & PUGET SOUND RAIL-
WAY COMPANY, (a Corporation), J. E.
WOODS and M. I. CHAPPEL,

Defendants.

BE IT REMEMBERED that on the 31st day of
March, 1913, there was filed in the above-entitled
court a Transcript on Removal from the District
Court of the Second Judicial District of the State

*Page-number appearing at top of page of original certified Transcript
of Record.

2 *Chicago, Milwaukee & St. Paul Ry. Co. et al.*

of Montana, in and for the County of Silver Bow, which said Transcript on Removal contains an Amended Complaint in the words and figures, following, to wit: [2]

*In the District Court of the Second Judicial District
of the State of Montana, in and for the County
of Silver Bow.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE and ST. PAUL RAIL-
WAY COMPANY, a Corporation, CHICAGO,
MILWAUKEE and PUGET SOUND RAIL-
WAY COMPANY, (a Corporation), J. E.
WOODS and M. J. CHAPPEL,

Defendants.

Amended Complaint.

Comes now the plaintiff above named and files this his amended complaint and for cause of action against the above-named defendant complains and alleges:

I.

That the defendant Chicago, Milwaukee and St. Paul Railway Company is a corporation duly organized and existing and doing business in the State of Montana.

II.

That the defendant Chicago, Milwaukee and Puget Sound Railway Company at all times herein mentioned was and now is a corporation duly organized

and existing and at all times hereinafter mentioned owned and operated a certain railway system, comprising tracks, and other appurtenances thereunto belonging, said railroad system at the time of the accident hereinafter mentioned running through and across the County of Silver Bow and the City of Butte, Montana, and particularly across that certain public street in the City of Butte known as Montana Street, said crossing being near the junction of Greenwood Street with the said Montana Street, The said Montana Street at said crossing is in a thickly populated portion of the City of Butte, and at all times many people travel upon the same all of which was known to the defendants.

[3] III.

That on the 5th day of November 1912, David Clement, Jr., was a boy of about the age of fifteen years, and a son of the plaintiff herein that on said day, J. E. Woods was an engineer in the employ of the Chicago, Milwaukee and Puget Sound Railway Company and a servant of said company, driving a steam locomotive, operated by the said company on one of its tracks at the time of the accident hereinafter mentioned; that M. J. Chappel was in the employ of the Chicago, Milwaukee and Puget Sound Railway Company as foreman of the engine crew and at the time of the accident hereinafter referred to was riding upon the engine operated by the said defendant Woods and directed the movements of the said engine at all times.

IV.

That on the morning of the 5th day of November

1912, at about the hour of four o'clock the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk-wagon, which was being drawn by said horses, going in a northerly direction, on Montana Street, a public street in the incorporated City of Butte, Montana, toward and near the intersection of the Chicago, Milwaukee and Puget Sound Railway Company's tracks and the said Montana Street (said crossing being near Greenwood Street in said city) and was not observant of the approach of a train which was running along said track in a westerly direction—the engine being under the control of the said J. E. Woods and the said M. J. Chappel and being used at the time for switching purposes in the yards of the said Chicago, Milwaukee and Puget Sound Railway Company; that the said David Clement, Jr., was coming directly within the way of the said approaching train; that the said engineer and the said Chappel did see the said David Clement, Jr., coming directly in the path [4] of the said engine, and did see that the said boy was in danger of being struck by said engine and that said boy was unobservant of the approach of the said engine; that the defendants then, after so seeng the boy in danger, negligently drove and ran said engine against the vehicle in which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine the said Clement boy was dragged by the same over and along the ground and

over and along the railroad track for a great distance and was drawn and dragged under the wheels of the said engine and the same was then and there run and driven over him whereby he was crushed and injured from which injuries he thereafter died.

V.

That all of the time above specified the above-mentioned Chappel and the above-mentioned Woods were acting within the course of their employment with the Chicago, Milwaukee and Puget Sound Railway Company.

VI.

That on or about the 24th day of December, 1912, the defendant Chicago, Milwaukee and Puget Sound Railway Company, a corporation, sold, transferred, set over and assigned and conveyed all of its railroad and property in the State of Montana and elsewhere to the Chicago, Milwaukee and St. Paul Railway Company, a corporation; that the Chicago, Milwaukee and St. Paul Railway Company, a Corporation, in and by the terms of the said sale and transfer of the said property aforesaid from the Chicago, Milwaukee and Puget Sound Railway Company, a Corporation, assumed all of the debts and obligations of every kind and character of the said Chicago, Milwaukee and Puget Sound Railway Company, a Corporation and entered upon the operation [5] and conduct and management of the said railroad business formerly conducted, operated and managed by the Chicago, Milwaukee and Puget Sound Railway Company.

VII.

That at the time of the accident, injury and death David Clement, Jr., was a strong and able-bodied boy of fifteen years of age, of good capacity for work, and of good disposition to work, and the plaintiff, had his son's life not been cut off by the negligent acts of the defendants here set out would have received from the boy's future earning until the boy became twenty-one years of age, five thousand (\$5,000) dollars.

WHEREFORE plaintiff demands judgment against the defendants for the sum of five thousand (\$5,000) dollars and for his costs of suit.

B. K. WHEELER,
Attorney for Plaintiff.

State of Montana,
County of Silver Bow,—ss.

David Clement, being first duly sworn, on oath deposes and says: That he is the party named as plaintiff in the above and foregoing complaint; that he has read the said complaint and knows the contents thereof and that the matters and things therein stated are true of his knowledge except those matters and things therein stated on information and belief and as to those he believes them to be true.

DAVID CLEMENT.

Subscribed and sworn to before me this —— day of February 1913.

[Notarial Seal]

B. K. WHEELER,
Notary Public for the State of Montana, Residing
at Butte, Montana.

My commission expires February 15th, 1915.

Service of the above and copy rec'd. Feb. 13-13.

GEO. F. SHELTON,
.FRED J. FURMAN,
A. J. VERHEYEN,

[6] [Endorsed]: No. 4800. In the District Court of the Second Judicial District, Silver Bow County, Montana. David Clement, Plaintiff vs. Chicago, Milwaukee & Puget Sound Railway Co., a Corporation, Defendant. Amended Complaint. Filed Feb. 13, 1913. John J. Foley, Clerk. By J. F. Driscoll, Deputy Clerk. B. K. Wheeler, Attorneys for Plaintiff.

And thereafter, to wit, on the 4th day of March, 1913, Separate Demurrer of Defendant Chicago, Milwaukee and St. Paul Railway Company, a Corporation was filed herein, which is entered of record as follows, to wit: (Continued in said Transcript on Removal.)

[7] *In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

No. A-4800.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE and PUGET SOUND RAILWAY COMPANY, (a Corporation), J. E. WOODS and M. J. CHAPPEL,

Defendants.

Separate Demurrer of Defendant Chicago, Milwaukee and St. Paul Railway Company, a Corporation.

Comes now the defendant Chicago, Milwaukee and St. Paul Railway Company, a Corporation, and demurs to the amended complaint of the plaintiff on file herein; and alleges that the said amended complaint does not state facts sufficient to constitute a cause of action against the said defendant and in favor of the plaintiff.

GEO. F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[8] [Endorsed]: Title of Court and Cause. Separate Demurrer of Defendant Chicago, Milwaukee and St. Paul Railway Company. Filed March 4, 1913. John J. Foley, Clerk. By J. F. O'Brien, Deputy Clerk. George F. Shelton, Fred J. Furman, A. J. Verheyen, Attorneys for Demurring Defendant.

And thereafter, to wit, on the 4th day of March, 1913, Separate Demurrer of Defendant M. J. Chappel, was filed herein, which is entered of record as follows, to wit: (Contained in said Transcript on Removal.)

[9] *In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

No. A-4800.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE and ST. PAUL RAILWAY COMPANY, a Corporation, CHICAGO, MILWAUKEE and PUGET SOUND RAILWAY COMPANY, a Corporation, J. E. WOODS and M. J. CHAPPEL,

Defendants.

Separate Demurrer of Defendant M. J. Chappel.

Comes now the above-named defendant M. J. Chappel, and demurs to the amended complaint of the plaintiff on file herein; and, as ground thereof, alleges: That said amended complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this demurring defendant.

GEO. F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 4th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[10] [Endorsed]: Title of Court and Cause. Separate Demurrer of Defendant M. J. Chappel. Filed March 4, 1913, John J. Foley, Clerk. By J. F. O'Brien, Deputy Clerk. George F. Shelton, Fred J. Furman, A. J. Verheyen, Attorneys for Demurring Defendant.

And thereafter, to wit, on the 6th day of March, 1913, Separate Demurrer of Defendant J. E. Woods, was filed herein, which is entered of record as follows, to wit: (Contained in said Transcript on Removal.)

[11] *In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.*

No. A-4800.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS, and M. J. CHAPPEL,

Defendants.

Separate Demurrer of Defendant, J. E. Woods.

Now comes the above-named defendant, J. E. Woods, and demurs to the amended complaint of the plaintiff on file herein; and alleges that the said amended complaint does not state facts sufficient to constitute a cause of action against said defendant and in favor of the plaintiff.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Demurring Defendant.

Service of the above and foregoing Demurrer is hereby acknowledged, and copy thereof received, this 6th day of March, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[12] [Endorsed]. Title of Court and Cause. Separate Demurrer of Defendant, J. E. Woods. Filed March 6, 1913. John J. Foley, Clerk. By D. W. Lewis, Deputy Clerk. George F. Shelton, Fred J. Furman, A. J. Verheyen, Attorneys for Demurring Defendant.

And thereafter, on the 14th day of May, 1913, order was made overruling demurrers, being as follows, to wit:

In the District Court of the United States, District of Montana.

No. 123.

DAVID CLEMENT

vs.

CHICAGO, MILWAUKEE & PUGET SOUND RY.
CO. et al.

Order Overruling Demurrers.

By consent of counsel, demurrer overruled and defendant granted 20 days to file answer.

Entered in open court May 14, 1913.

GEO. W. SPROULE,
Clerk.

Attest a true copy of minutes.

[Seal] GEO. W. SPROULE,
Clerk.

And thereafter, to wit, on the 3d day of June, 1913, Answer to Amended Complaint was filed herein, which is entered of record as follows, to wit:

[13] *In the District Court of the United States for the District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS, and M. I. CHAPPEL,

Defendants.

Answer of Defendants to Amended Complaint.

Come now the defendants, and, for their answer to the amended complaint of the plaintiff on file herein, admit, deny, and allege:

I.

Admit the allegations contained in paragraphs numbered I, III, V, and VI, of said amended complaint.

II.

Deny the allegations contained in the last sentence of paragraph numbered II of the said amended complaint.

Admit each and every other allegation contained in said paragraph II of said amended complaint.

III.

As to the allegations contained in paragraph numbered IV of said amended complaint, defendants admit that on the morning of November 5, 1912, at about four o'clock, [14] David Clement, Jr., was driving a pair of horses attached to an enclosed milk-wagon, going in a northerly direction on Montana Street, a public thoroughfare in the City of Butte, toward and near the intersection of the defendant railway company's tracks and Montana Street; and admit that J. E. Woods was engineer of the said locomotive, and M. I. Chappel was foreman of the switching crew; and admit that no gates were lowered at that time and place; and admit that David Clement, Jr., was killed in a collision at that time and place.

Deny each and every other allegation in the said paragraph numbered IV contained.

IV.

Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered VII of said amended complaint.

V.

Deny each and every other allegation in the said amended complaint contained, not hereinbefore specifically admitted or denied.

WHEREFORE, said defendants, having fully answered, pray to be hence dismissed, with their costs in this behalf expended.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,
Attorneys for Defendants.

[15] State of Montana,
County of Silver Bow,—ss.

Fred J. Furman, being first duly sworn according to law, deposes and says: That he is one of the attorneys for the above-named defendants, and makes this affidavit of verification on behalf of said defendants for the reason that none of said defendants or the officers of said corporation defendants above named are at this time present in the County of Silver Bow, State of Montana (where affiant resides), and therefore cannot make said affidavit on behalf of said defendants, or any of them. That affiant has read the above and foregoing answer to the amended complaint, and knows the contents thereof; and that the same is true according to the best knowledge, information, and belief of affiant.

FRED J. FURMAN.

Subscribed and sworn to before me this 3d day of June, 1913.

[Seal] A. J. VERHEYEN,
Notary Public for the State of Montana, Residing at
Butte, Montana.

My Commission expires Jan. 23, 1915.

Service of the above and foregoing Answer is hereby acknowledged, and copy thereof received this 3d day of June, 1913.

B. K. WHEELER,
Attorney for Plaintiff.

[16] [Endorsed]: No. 123. In the District Court of the United States for the District of Mon-

tana. David Clement, Plaintiff, vs. Chicago, Milwaukee and St. Paul Railway Company, a Corporation, et al., Defendants. Answer of Defendants to Amended Complaint. Filed June 3, 1913. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[17] And thereafter, to wit, on the 19th day of May, 1916, Verdict was filed herein, which is entered of record as follows, to wit:

[18] *In the District Court of the United States,
District of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE AND PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS, and M. I. CHAPPELL,

Defendants.

Verdict.

We, the jury in the above-entitled action, find our verdict in favor of the plaintiff and against the defendants and fix his damages in the sum of two thousand five hundred dollars.

A. T. MORGAN,

Foreman.

[Endorsed]: No. 123. In the District Court of the United States, District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee and St.

Paul Railway Company, a Corporation, Defendant.
Verdict. Filed May 19, 1916. Geo. W. Sproule,
Clerk. By C. R. Garlow, Deputy. B. K. Wheeler,
Attorney for Plaintiff.

[19] And thereafter, to wit, on the 22d day of
May, 1916, Judgment was entered herein, which is
entered of record as follows, to wit:

*In the District Court of the United States, District
of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE AND ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHICAGO,
MILWAUKEE & PUGET SOUND RAIL-
WAY COMPANY, a Corporation, J. E.
WOODS and M. I. CHAPPEL,

Defendants.

Judgment.

BE IT REMEMBERED, that on the 17th day of
May, A. D. 1916, at the courtroom at Butte, Montana,
in the above-entitled district, the above-entitled
cause came on for hearing and trial, B. K. Wheeler
and A. A. Grorud, representing the plaintiff, and
Geo. F. Shelton, Fred J. Furman and A. J. Verheyen
representing the defendant; a jury of twelve good
and lawful men was regularly impaneled and sworn
to try the cause; evidence was introduced from sworn
witnesses on behalf of the defendant; counsel for

the respective parties argued the cause to the jury; the Court thereupon delivered to the jury its charge and instructions, and thereupon the jury retired to consider of their verdict and subsequently on the 19th day of May, A. D. 1916, returned into court with their verdict in words and figures as follows.

(After Title of Court and Cause.)

We, the jury in the above-entitled action, find our verdict in favor of the plaintiff and against the defendants, and fix his damages in the sum of two thousand five hundred dollars.

A. T. MORGAN,
Foreman.

And thereupon and by virtue of the premises, it is ORDERED, ADJUDGED and DECREED that David Clement have and recover of and from the Chicago, Milwaukee and St. Paul Railway Company, a corporation, Chicago, Milwaukee & Puget Sound Railway Company, a corporation, J E. Woods and M. I. Chappel, the sum of two thousand five hundred [20] (\$2,500) dollars, together with costs taxed at the sum of fifty-one 70/100 dollars, and also interest on both of said amounts at the rate of eight per cent per annum from date thereof until paid, and that he have execution therefor.

Judgment entered this 22d day of May, A. D. 1916.

GEO. W. SPROULE,
Clerk.

By Harry H. Walker,
Deputy.

[Endorsed]: No. 123. In the District Court of the United States, District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Co., a Corporation, Chicago, Milwaukee & Puget Sound Railway Co., a Corporation, J. E. Woods and M. I. Chappel, Defendants. Judgment. Wheeler & Grorud, Attorney's for Plaintiff.

[21] And thereafter, to wit, on the 13th day of June, 1916, a Petition for a New Trial was filed herein which is entered of record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPELL,
Defendants.

Petition for a New Trial.

Now come the above-named defendants and petition the Court for a new trial of said cause, for the following causes materially affecting the substantial rights of the losing parties in said cause, to wit:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the verdict.

3. Errors in law occurring at the trial.

And, as a specification of the particular errors of law occurring at the trial and relied upon by petitioners, they offer the following, to wit:

1. The Court erred in refusing to grant the motion of the defendants for the Court to instruct the jury to find a verdict for the defendants upon the close of all the testimony in the cause.

And, as a specification of the particulars wherein the evidence is claimed to be insufficient to support [22] the verdict, petitioners set forth and aver the following, to wit:

1. In order for the plaintiff to recover in this action it was necessary for him to establish by the testimony in the case that the accident was caused by the negligence of the defendants, and that plaintiff's son, David Clement, Jr., was not guilty of concurrent negligence, which resulted in the accident and his death; and that the uncontradicted testimony in the case is that said David Clement, Jr., was guilty of concurrent negligence, which directly caused the accident and resulted in his death.

This petition will be made upon the files and records in this case and upon the minutes of the Court, including the clerk's minutes and any notes or memoranda which may have been kept by the Judge during the trial; and also upon the reporter's transcript of his shorthand notes; and also upon the bill of exceptions prepared and served, and to be here-

after settled, allowed and filed in this cause.

Dated June —, 1916.

SHELTON & FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

[23] Service of the above and foregoing Petition for a New Trial is hereby accepted, and a copy thereof received, this — day of June, A. D. 1916.

B. K. WHEELER,

Attorneys for Plaintiff.

I hereby certify that in my opinion the within and foregoing Petition for a New Trial is well founded in point of law.

FRED J. FURMAN,

Of Counsel for Defendants

[Endorsed]: Title of Court and Cause. Petition for a New Trial. Filed June 13, 1916. Geo. W. Sproule Clerk. By Harry H. Walker, Deputy. Shelton & Furman, A. J. Verheyen, Attys. for Defs.

[24] And thereafter, to wit, on the 13th day of November, 1916, Opinion of the Court, was filed herein, which is entered of record as follows, to wit:

United States District Court, Montana.

DAVID CLEMENT,

vs.

CHICAGO-MILWAUKEE & ST. PAUL RY. CO.

Opinion.

Plaintiff's son aged one month less than 16 years, was killed by defendant's negligence in Nov., 1912,

and plaintiff sued for only his loss of the boy's earnings till 21 years of age. The jury awarded \$2500 therefor, in May, 1916, and defendants move for a new trial in that the damages are excessive.

The fother plaintiff, is a miner. The boy had lived apart from his father for indefinite years-in Wales and 7 years in a charitable home, and in May 1912, had been committed to the county industrial school as a "juvenile disorderly person" at the plaintiff's instant, for "rustling junk", plaintiff says. There he remained some six or seven weeks, returned to plaintiff, would not attend school, secured work with a milkman, worked 3 or 4 months at some undisclosed wage, gave his father \$15 from his "first" wages paid, and had drawn all his wages at the time of his death.

The law is that until a child is 21 years old the father must support and educate it, and is entitled to its services and earnings; that if before the child is 21 it is killed by another's negligence, the father is entitled to recover whatever amount it is reasonably probable the child's services and earnings would exceed the cost of its support and education. That is, the father cannot recover anything for loss of the child's society or for the father's grief, but only whatever pecuniary profit the child's death has deprived the father of. With this in mind and in the light of the evidence and common experience, the conclusion is compelled that the verdict is excessive. There is nothing to make it reasonably probable that plaintiff's boy, uneducated and [25] untrained, within 5 years of 21, who gave his father \$15, from

3 or 4 months' wages, which latter may have been \$20 to \$30 per month, would have profited his father \$2500 before the boy was 21 or anything like that. It is counter to common experience. It is highly improbable. Not one boy in 500 does it—can do it.

The determination of such cases in the nature of things must be conjectural in the main, but even the jury's conjecture must be based upon the evidence and must be reasonably probable in view of the evidence. A jury is not privileged to award any sum it sees fit, but only such sum as the evidence reasonably justifies. The evidence herein does not render it reasonably probable that had the boy lived to 21, the plaintiff could and so would have received from him a profit of \$2,500, or anything like that. thing like that.

In such cases juries are more or less unconsciously influenced by the fact of death, pain, loss of society, grief, to award excessive amounts. They overlook that pecuniary profit is all that figures in cases where a parent sues for a child's death. It is so in this case. Resolving doubts against defendants whose fault compels a determination where exactitude is impossible, the Court believes any profit plaintiff could and so would in reasonable probability have received from the boy until aged 21, to be within \$1500.

The evidence supports no more. Hence, the case will be submitted to another jury unless plaintiff rerits \$1,000 of the verdict, and within 10 days. It is optional with plaintiff.

[Endorsed]: No. 123. Clement vs. Ry. Co. Memo. Filed Nov. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[26] And thereafter, to wit, on the 19th day of October, 1916, Bill of Exceptions was filed herein, which is entered of record as follows, to wit:

*In the District Court of the United States for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff.

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpora-
tion, J. E. WOODS and M. J. CHAPPELL,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED, that in the above-entitled action David Clement, plaintiff above named, brought his suit against the Chicago, Milwaukee & Puget Sound Railway Company, a corporation, J. E. Woods and M. J. Chappell, to recover the sum of \$5,000 for the loss of the earnings of his son, because of the death of David Clement, Jr., from personal injuries alleged to have been suffered by the said David Clement, Jr., at the time and in the manner specified in the complaint herein, and also in the amended complaint herein.

Upon the issues raised by the amended complaint (in which the Chicago, Milwaukee & St. Paul Rail-

way Company, a corporation, was joined as a party defendant to said action), and the answer of the defendants to said amended complaint, the said cause came on for trial on May 17th, 1916 before the Court and a jury of twelve persons impanelled and sworn to try the issues in said cause, B. K. Wheeler and A. A. Grorud, appearing as counsel for plaintiff, and Messrs. Shelton & Furman, and A. J. Verheyen appearing as counsel for defendants.

Whereupon the following proceedings were had and done, the rulings of the Court hereinafter set forth were made and the exceptions of the defendants thereto noted:

Testimony of David Clement, in His Own Behalf.

[27] Wednesday, May 17, 1916, one o'clock P. M.

DAVID CLEMENT, the plaintiff, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination By Mr. WHEELER.

THE WITNESS.—My name is David Clement; I am a miner; I have lived in Butte 27 years. During that time I have been employed at the smelters and the mines; I worked in the smelters down at Meaderville, in the old-time smelter. David Clement, Jr., was my son. I remember the time he was killed, on the 5th day of November, on the morning of the 5th day of November. At that time he was coming sixteen years of age. At the time he was killed he was driving this here milk-wagon. He had been working for Mr. Glover; I could not say exactly how long he had been working for Mr. Glover; I

(Testimony of David Clement.)

guess about three months, may be a little more. He was living at the ranch when he was working. Before he went to work for Mr. Glover he was living with me, at 707 Division street, here in Butte. I am forty-seven years old.

Q. Mr. Clement, what have you to say with reference to the boy, as to whether or not he was industrious, and so forth?

Mr. FURMAN.—We object to that, on the ground it is unduly leading and suggestive; it doesn't appear necessary to lead or suggest to the witness the line of testimony desired.

The COURT.—Well, it only points attention to what counsel means by disposition. Overruled. Isn't it admitted by the answer? Well, anyway, proceed; the objection is overruled.

Mr. FURMAN.—Exception.

[28] A. Well, his ambition was all for work. The boy was working at this time, and the first payment he had—(interrupted). He was a good boy, couldn't be beaten. As to his disposition, he was all right; I never seen anything wrong with him; his disposition was good, always. He had a good feeling towards me. As to his size, he was a pretty good boy for his age, good health, strong; big boy for his age. As to what he did with his money when he went to work—the first payment he had why he fetched it home to me; I got fifteen dollars, but I don't know how much he was getting or nothing else; I never questioned him anything of that kind; I can't recollect when I got that; just one month he had

(Testimony of David Clement.)

been working at the time, I guess. He gave me that money just to help me out. While he was working at Mr. Glover's place I saw him every day. He come right to the home; right in my home. I sent him to school. As to the occasion of his quitting school,—his ambition was he wanted to work.

Q. What was the boy's—was anything said by the boy to you with reference to his going back to school?

Mr. FURMAN.—Just a minute. We object to that on the ground that is hearsay, it is irrelevant.

The COURT.—Oh, it would have a tendency to show the possible or probable amount that the boy would have contributed to the father; I am not clear whether it makes for the benefit of the *benefit of the* plaintiff or the defendant; he may answer; the objection is overruled.

Mr. FURMAN.—Exception.

A. No, he didn't want to go to school; he wanted to go to work.

[29] Cross-examination by Mr. FURMAN.

The WITNESS.—David Clement, Jr., was born in Meaderville, in 1896, the 16th of December. I live at 707 Division street here in Butte, now; I lived in Meaderville about four years after his birth. I did not come to Division street immediately after that. I roomed and boarded on East Broadway. David Clement, Jr., did not room and board with me at that time. He was back in Wales at that time, Swansea. David Clement, Jr., was seven years in the Paul Clark Home, maybe a little more. After that he was in the Industrial School. I don't know

(Testimony of David Clement.)

how long he was there, six or seven weeks, maybe a little more. He must be about fourteen when he was in the Industrial School. He lacked about a month of being sixteen at the time he was killed. I could not tell you the name of the school he went to; it is on the west side; I couldn't get him to go to school when I got him home. When he came from the Paul Clark Home he must have been close to fifteen years of age. He wouldn't go to school. He came back to my home after he left the Industrial School. He was sent to the Industrial School on account of a complaint made by me. I couldn't say how long he was kept there, I guess he must have been there about four or five weeks, may be a little more; I don't remember, exactly the time. After he came back from the Industrial School he lived with me at my house until he got this job on the milk-wagon. He spent his nights at home, every night. I did not get him the job; he rustled the job himself; I never knew how much he got for it. I did not know Mr. Glover prior to the time he went to work for him, or Mr. Glover's partner, Mr. Turner. I just met them two or three times at that time; I don't believe I would know [30] *know* them if I would see them on the street. I did not draw the pay myself; he fetched his pay to me. Mr. Turner or Mr. Glover did not pay me any money at all that had been earned by him. I did not make any demand on them.

Q. After he had worked out there for a month he paid you fifteen dollars?

A. Fetched fifteen home, sir.

His mother is dead. He worked for Mr. Glover

(Testimony of David Clement.)

and Mr. Turner close to three months; I don't know exactly how long he worked. As to what his duties were—he drove this milk-wagon; I don't know whether he had anything extra. He never told me the details of his work. He never told me what time he had to get up in the morning. I know what time in the morning he was killed; I guess it must have been about close to four o'clock, because I was coming off of shift at that time myself. I was working as a miner at that time. I am not sure whether I was getting \$3.50 at that time; it wasn't less than \$3.50. I was simply getting straight time. He was not my only child; I have a daughter back in Wales, born in this country. David Clement was my only child in this country. At the time he was killed I was living at 707 Division Street, the same place as I am now. I should judge it was about a mile from the place where David Clement was killed to the milk ranch; I don't know much about the distance. I was out there one time, when the accident happened, just a few days. David Clement, Jr., never worked for wages prior to the time he went to work for Mr. Glover. I could not say how tall a boy he was at the time of his death; I have no idea how tall he was; I can't explain how tall he was. He must have weighed close to a hundred pounds. [31] As to my having any intention of sending David Clement, Jr., to school any more—I would, but I couldn't get him to go to school. At the time he was working he called home every day; he left milk; he didn't stay there at night. Every day he came to the home and left milk. I couldn't see him every day when

(Testimony of David Clement.)

I would be day shift. During the time he worked for Glover and Turner I seen him pretty often. He was always driving his milk-wagon. He came in the house and visited with me; he did that frequently.

Redirect examination by Mr. WHEELER.

The WITNESS.—I have a daughter in Wales. The boy's mother is dead. I had the boy sent to the Industrial School on one occasion. He started to go out rustling this here hides and copper and one thing and another that I didn't wish for him to do; that was the reason, he wouldn't go to school or nothing, and that is the reason I fetched him *uo* myself. He remained there four or five weeks, may be six weeks. After that he stopped with me until he got this job.

Recross-examination by Mr. FURMAN.

Q. You made application to Judge Donlan to have the boy sent to the Industrial School?

A. Yes, I just took him up to Jerry Murphy, I believe, up to the courthouse here, at night; I mean Jerry Murphy, the chief of police now, in the city hall. He was sent from the city hall. I wouldn't like him to rustle this here copper and iron. As to his taking copper and iron that didn't belong to him—I understood he started in to rustle it; I didn't wish for him to do that.

Witness excused.

[32] Mr. WHEELER.—At this time, may it please the Court, I desire to offer in evidence the deposition of M. I. Chappell, I will say to counsel—I understand they admit that Mr. Chappell is now out of the state, in the State of Idaho.

(Testimony of David Clement.)

Mr. FURMAN.—On the statement of counsel that Mr. Chappell is without the state, and is in the State of Idaho, I will admit that that is a fact.

Mr. WHEELER.—I will say to your Honor, that this deposition was taken pursuant to a stipulation entered into on the 27th day of February, 1913. We now offer in evidence the deposition of M. I. Chappell, taken on the 27th day of February, 1913; it was signed, subscribed and sworn to on the 27th of February, 1913.

The COURT.—Very well.

Mr. WHEELER.—(Reads deposition of M. I. Chappell, taken on the 25th day of February, 1913, before Charles H. Little, Notary Public, at Butte, Montana, the witness being interrogated by B. K. Wheeler, Esq., of counsel for the plaintiff, and by Fred J. Furman, Esq., of counsel for the defendants, which said deposition, as narrated, is as follows):

Deposition of M. I. Chappell, for Plaintiff.

M. I. CHAPPEL, having been first duly sworn, testified as follows:

Direct examination by Mr. B. K. WHEELER.

The WITNESS.—My name is M. I. Chappell, I am a railroad man, train and yard service. I have been engaged in the railroad business since 1897. During that time I have been a brakeman, conductor, switchman. I have handled engines, on different occasions. At the present time I am employed by the Chicago, [33] Milwaukee & St. Paul-Puget Sound, at the time of this accident. This accident in which David Clement lost his life occurred on the morning of the

(Deposition of M. I. Chappell.)

5th of November, 1912, at 4 A. M. I had been in the employ of the Chicago, Milwaukee & Puget Sound since sometime in June; I don't remember the date exactly. I was employed as a foreman of the yard crew; personal charge of the yard engine and crew. It was at four in the morning that the engine struck David Clement. The whistle was blown about four hundred feet east of the crossing, Montana Street. Before we come to the crossing we are rounding a curve. You could not see the road from the place where the whistle was blown. At the time that the whistle was blown, 400 feet east of the crossing, I hadn't seen the wagon at all then. I was standing on the rear footboard on the engineer's side of the engine. The train was going west. The engine was backing; the cars were on the east end of the engine. I stood on the end of the engine which struck the team on which David Clement was riding. We were going about five miles an hour, at the time we struck him. We left the yards at 3:55, when I gave the signal to go. It is in the neighborhood of a fourth of a mile from the yards over to the crossing. I looked at my watch when I got on the ground and could get it out of my pocket, at the time we struck the team; it was then just four o'clock. From the starting point to the point of the accident we had been about five minutes. I first saw this team coming when I got to a point where the view was unobstructed, at a distance of about 330 or 340 feet. The team was not going very fast; they were going at a little jog of a trot. I should say they were going four miles an hour. Where this team was struck I think is the only point that the Mil-

(Deposition of M. I. Chappell.)

waukee [34] crosses Montana Street in Butte. It is the crossing by the side of the old Butte Reduction Works. I do not know whether there is a cross street there. I do not remember a fence or cars or anything that would identify it. I noticed the kind of a wagon it was from where I stood on the engine. I could see that it was a covered wagon. The person in the wagon did not stop the team at any time; never made any stop. He did not attempt to make any stop. The team never slackened, and never showed any indications that there was any line pulled on them at all. I could see the lines after I—I don't know just what the distance was that I could see the lines, but the slack wasn't taken out of them at the point where I could see them. There was never any effort on his part made to stop that I could see. There was no effort, and the team wasn't checked at any time; they continued in their same gait all the time that I seen them, until the engine struck the wagon. As to what my duties are with reference to stopping an engine or trying to stop it, when I see an object on the track,—my duty would be to signal the engineer. I was foreman of the yard crew. The foreman of the yard crew holds the same position as the conductor of a train; that is, he superintends the switching of all cars and assists also. As to my usually riding upon the engine, it depends; if I was pushing cars ahead of the engine, I would be on the point, furthest point ahead, that is, in case I was pushing cars ahead of the engine. On this evening I gave a signal to the engineer. I remember that the engineer testified at the coroner's in-

(Deposition of M. I. Chappell.)

quest. I gave the engineer one sign about 150 feet east of the crossing, may be a little more. The first signal I gave him was what is called a slow sign. I gave him another signal; I gave him the signal to stop. [35] I gave one about two car lengths, probably a hundred feet or seventy-five feet, or in that neighborhood; I can't state definitely; I don't know exactly what the distance was, somewhere in that neighborhood. The bell was ringing; I remember of hearing it about the time the whistle was blowing, shortly afterwards. The engineer of the train is obliged under the rules of the company to obey any orders that I give him, when they are considered safe in his judgment. He is supposed to obey any signal that is given to him by me or any of my helpers, under any circumstances. That is the way we work; we are regulated—we work by signals, passed from a man to the engine, either by hand or lamp. I was in charge of the engine. As to how I happened to be riding on the rear end of this engine on this morning, I always make it a point to ride on the end of the engine or cars, as I stated before,—looking out for any obstruction we might get up against, in case of any obstruction we might come up against, for protection. There is a common expression used among railroad men, in making an emergency application of air-brakes, is the “big hole.” By “sanding” an engine is meant the placing of sand on the rail, so that it will go under the wheels. By throwing an engine into the reverse is throwing it into the opposite motion to what she is in in the direction she is running. I do not think

(Deposition of M. I. Chappell.)

there was any sand upon this particular engine on that evening.

Q. Well, don't you know, Mr. Chappell, that there wasn't any sand at all upon that engine on the morning of the 5th of November, 1912?

Mr. FURMAN.—We object on the ground it is leading and suggestive and argumentative.

The COURT.—I think he may answer. The objection is overruled.

Mr. FURMAN.—Exception.

[36] A. Well, I never seen any put on her; never had seen any sand put on her, and from her performance—of the engine—I don't imagine it had any sand.

Mr. FURMAN.—We move to strike that as not responsive.

The COURT.—Yes, it is a circumstance from which an inference might be drawn. Proceed.

Mr. FURMAN.—Exception.

The WITNESS.—I could not state, from where I was upon the engine, whether or not any sand was used. I couldn't tell unless I could see it running. Unless I could see it running from the pipe to the rail; the pipe leading from the sand-box to the rail. I could tell by the action of the engine whether or not any sand was put upon the track. My opinion is that there was no sand used upon the rails on the morning of the 5th of November, 1912, just prior to and at the time of the accident.

I am one of the defendants in this action.

Q. Could the engineer see the same distance down the track that you could?

(Deposition of M. I. Chappell.)

Mr. FURMAN.—We object on the ground that that calls for a conclusion of the witness.

The COURT.—I think he can answer that question. He was in a position where he ought to know. The objection is overruled.

Mr. FURMAN.—Exception.

A. Yes, he could practically see the same distance. We were the length of the tank apart, was all. This accident occurred on the main line of the Chicago, Milwaukee & Puget Sound. A number of train had been run over that track on this night, prior to the accident, during my time on duty, commencing at seven P. M. I do not know approximately how many trains had been run over that track during that time, from the time that I went on duty until the time of the accident; I kept no [37] record of them; the regular trains had passed.

Q. What are the regular trains; how many regular trains go out?

Mr. FURMAN.—Now, we object, on the ground that there is no testimony in this case that would charge the witness with any knowledge of the number of trains, or would imply that he had any such knowledge, or would bring it under his duty to be in possession of such knowledge.

The COURT.—Well, this man is a practical railroad man. The objection is overruled.

Mr. FURMAN.—Exception.

A. There are two passenger trains, one from each direction, that are regular trains, and the freight trains are irregular, and as to the number of them

(Deposition of M. I. Chappell.)

that passed through the yards or over this piece of track that night, I can't say. The two regular trains, the one going east and the one going west, went out that night over that piece of track. There were freight trains went over that track that night.

I had twelve cars attached to the engine that night. The tonnage was approximately 700 tons, gross tonnage. I do not know the actual condition of the brakes on the cars and upon the engine; they had passed the car inspectors in the yard, and it wasn't my duty to examine them thoroughly, more than the air was cut in from the engine to and including the last car.

When I gave the first signal to the engineer to slow up I was approximately 150 feet east of the crossing. When I gave the signal to stop I was approximately 75, between 75 and a hundred feet from the crossing.

know what is known as an angle-cock on an engine. There is one on each end of the engine. One is called a stop-cock; that is the angle-cock; it [38] is on the end of the train line on a car or an engine; it is the end of the car where the hose is connected for making a coupling from between one car and the engine, or between cars; there would be a stop-cock on each end of the train line on all cars equipped with air, and also on all engines. The stop-cock would be on the back of the engine on this particular night, or of the train on which I was riding. That stop-cock was about a foot away from where I was standing. As to whether or not if that stop-cock had been open, that the train or the engine would have stopped that much quicker—

(Deposition of M. I. Chappell.)

the opening of the angle-cock on the rear of the engine, it would make an emergency application on the brakes—full power. This angle-cock was not opened on this particular evening. As to why I did not open this angle-cock—in the first place, I didn't realize it was necessary, as the engineer could work the brakes from the engine with the same effect as opening the angle-cock, until it was too late for me to reach down and open it with my hand. Before leaving the engine I tried to kick it open, and I couldn't, with my foot. As to how far away I was from the cars when I tried to kick it open with my foot—it was immediately after giving him the sign, or shortly after; I don't know just what distance after I gave him the stop sign. When I gave him the stop sign I made up my mind it was necessary to stop, and to help matters along took a kick at the angle-cock, which would have the same effect as the brake valve, but I didn't get it open, and I got off.

Throwing an engine into the reverse puts her in the opposite motion. I could not tell whether the engine was put into reverse on this particular morning, after I had given him the [39] signal to stop. I could tell under certain conditions. Putting an engine in reverse with the air, and giving the steam—working against the train, will lock the drivers, the wheels—slide them.

Q. Well, I will ask you whether or not that was done, or I will ask you whether or not you could tell whether or not that had been done on this particular

(Deposition of M. I. Chappell.)

morning—the morning of the accident, just prior to the accident?

A. Well, I didn't see the sliding and I didn't hear them. When it was thrown into reverse it would make a noise upon the track if the wheels were locked and the drivers were sliding. On this particular morning I didn't hear that at all. I think I would have heard it if it had been done. Where you use sand upon the track it has a tendency to stop the engine quicker. I am familiar with the effect that it does have from my experience in railroading.

We went four car lengths and a half past the crossing before the engine finally came to a stand still. The fifth car was on the crossing. We went four car lengths and a half and the engine and tender length. The length of the engine and the tender was probably forty feet. The cars run from 36 to 40 feet in length. We had the regulation headlight on the engine; a kerosene light. The headlight was burning when we left the yard. I did not notice it after we left the yard.

From my experience in railroading I have had occasion to see a large number of trains stopped in an emergency case, in cases of emergency. As to what distance a train can be stopped in—it depends on conditions, the braking power, the train line being charged. I do not know what the grade of the track there is; I imagine it is somewhere in the neighborhood of one-half of one per cent.

[40] Q. I will ask you if it isn't a fact, Mr. Chappell, that going at the rate of five miles an hour, upon

(Deposition of M. I. Chappell.)

a track of the grade of the track of the Chicago, Milwaukee & Puget Sound, at the place where the accident occurred, and for a distance of 150 feet east of it—if the air had been put on and the engine had been thrown into reverse, and the track sanded, if the engine hadn't ought to have been stopped in the distance of 25 feet, taking into consideration also the tonnage that you had on this evening?

Mr. FURMAN.—We object on the ground that other material considerations are not touched in the question—no sufficient foundation laid to support an opinion of an expert; that it calls for a conclusion of the witness, and is incompetent, irrelevant and immaterial.

The COURT.—He may answer, the objection is overruled.

Mr. FURMAN.—Exception.

A. Does that include the braking power and everything in first class condition?

Q. (Question read) —and the braking power in good condition.

A. Does good condition mean first class condition or what?

Q. First class condition.

A. Well, I imagine the stop could be made somewhere in that territory, in that neighborhood, anyway, under those conditions.

Q. In what distance would you say that a train ought to be stopped—similar to the one that you were in charge of, on the morning of the 5th of November, 1912, and under exactly the conditions which pre-

(Deposition of M. I. Chappell.)

vailed there on that morning?

A. It did stop in about 150 feet. Does that mean from the point—I don't understand that question.

Q. Not asking you from any point; I am simply asking you in [41] what distance it should stop in, not what distance it did stop.

(Question read):

A. Under the conditions that prevail? Well, I don't know exactly what the conditions were. I don't know exactly in what position the engineer was.

Q. Well, I am assuming he was in the position that an engineer should be in, when he has charge of an engine?

A. That is practically the same question as was asked before.

Q. Yes, it is practically the same question. Well, you would say, would you not, that it ought to be stopped, in ordinary circumstances and conditions, that it ought to be stopped in twenty-five feet? Or would you say fifty feet?

A. Well, from 25 to 40 feet.

The engine struck the wagon just behind the front wheels. It broke the rear wheels. The engine struck the wagon, struck behind the front wheels, and the wagon was carried on the footboard and drawhead of the engine, and was slid along the rails, and was still threw when the train stopped. I saw the body of the boy after the engine stopped, the train stopped. The body was between the second and third cars from the engine; that would be three car lengths and a

(Deposition of M. I. Chappell.)

half, west from the center of the crossing; it would be about 125 feet west of the crossing. I did not examine the body thoroughly when I found it; I saw it more than once; I was alone the first time I saw it.

Q. What was the condition of the body with reference to the arms, and bruises and injuries?

Mr. FURMAN.—We object in this particular case, to testimony relating to the injuries to the body, on the ground it is irrelevant, incompetent and immaterial, in this particular case; it was competent and relevant in the other, undoubtedly.

Mr. WHEELER—Well, this is for the purpose of showing he was [42] killed and the condition that he was in.

Mr. FURMAN.—Well, it is admitted he was killed.

The COURT.—I think it might have some tendency to indicate at what speed the train was going; I think otherwise it would be harmless; it will be guided by instructions, that it isn't for the purpose of awakening the sympathies of the jury. Of course, the death is shown. So the objection will be overruled.

Mr. FURMAN.—Exception.

A. Well, the left arm was gone; the right hand was gone, and the skull looked to be crushed.

I could not tell whether there were any signs of life in the body at the time that I saw it first. I did not make an examination of it close enough to tell whether or not there was any breathing or anything

(Deposition of M. I. Chappell.)

of the kind. There was no move made by the boy after I saw him that I could see. When the train stopped, I had seen no man up to this time, but imagined there was one, under the conditions of the thing; I immediately jumped across; I got off on the south side, as soon as they got stopped I jumped across, to see what had happened in regard to the team, and so forth. As far as I know I was the first one that saw the body. It was possibly a minute after we struck the wagon, my be a little more, before I saw the body. I could not tell whether or not the boy was breathing any at that time. As to my best judgment in the matter, with reference to whether or not there was still any life in the body, I couldn't say; the body was in such a condition that I couldn't take hold of it. So I went for assistance, that is, to the engine; I went down on the left side, met the fireman, he just got down with his torch, came out off of the engine on the ground with his torch in his hand, and I asked him where the engineer was, and he told me he was on the other side, and I [43] crossed over, crawled between the cars. I did not examine the wagon to see if the side which was struck was crushed in. I don't remember how—I know there was part of the wagon left; there was part of the top of the wagon left hanging on the footboard and on the rail, supported by the drawhead. I did not see the arm of the boy or the hand of the boy before it was picked up; I don't believe that I did; I don't remember it; I think I was with the undertaker when he picked up

(Deposition of M. I. Chappell.)

the hand. That was down somewhere in the neighborhood of the body; it wasn't far away. I could not tell whether the body had been dragged along the ground.

Q. How far was the boy away from the crossing when you first saw him, or how far was the team away from the crossing when you first saw it?

A. Well, it came in sight about the same time that—the team came in sight about the same time that the engine rounded the curve at a point where the view was unobstructed from building, and so forth. I should judge that was about 175 feet from the crossing, somewhere in that neighborhood. I didn't measure the ground; I can't answer accurately.

Q. And you say that from the time that you first saw him he never made any attempt to stop, but left the horses jog along at about four miles an hour?

A. Something like that; there was no effort on the part of the driver, if there was one, that I could see; in fact I didn't know there was one. I could not tell whether there was or not. As to other noises from the engine other than the ones that I have specified,—there was an exhaust from the pump, from the pump of the engine, that makes considerable noise at all times when it is working. The whistle was never blown from the time it was blown about 400 feet east of the crossing, that I knew of. That was the regulation crossing [44] whistle, consisting of one long and two short blasts.

I made a statement to Mr. Webb. That was a

(Deposition of M. I. Chappell.)

few days after the accident occurred. It was a signed statement by me. It was made for the claim department; I don't know what they do with them; I suppose it was made for the claim department, Mr. Webb, as I understand, represents the claim department.

This wagon was what you would call a spring wagon, if I remember right, when I was on the farm; that is what they called them, covered over from front to rear, painted white, with glass on the side extending back probably, oh, I couldn't say exactly; it looked to be about three feet.

Q. Could you tell whether or not any effort was made on the part of the engineer, after you gave him the signal to slow, to slow up, to slow the engine?

A. Why, I don't know; I couldn't answer for what he did. He wasn't working steam, and the train was slowing up. I couldn't tell exactly—I was watching the team. He might have made a slight application of air.

Q. You could tell whether or not, after you gave him the signal to stop, could you not, whether or not he threw the engine into reverse?

A. Yes, I believe I could.

Q. And I will ask you whether or not he did throw it into reverse after you gave him the signal to stop.

A. I don't know; I didn't see him throw it over.

Q. But you do know that the engine didn't slide along on the track as it ordinarily does when it is thrown in reverse?

A. I didn't see any indication to show that the

(Deposition of M. I. Chappell.)

engine was thrown in the opposite motion at any time.

[45] Cross-examination by Mr. FURMAN.

The WITNESS.—I have never been employed as an engineer. On this night in question I was in charge of the train; that includes the engine and crew. At the time of the accident I could not see, relative to the engineer and his actions.

Redirect Examination by Mr. WHEELER.

The WITNESS.—I could not see whether or not the engineer got my signals that I gave him. He might have been dead, for all I know. An engineer's position is on the right side, with his head out to the cab window, looking for signals or obstructions at all times. As to the signals I gave him,—a slow sign is a hand or lamp held out in sight, horizontally. And a stop sign is a lamp swung across the track, or swung in this manner, (Indicating.) I was on the south side of the engine, south corner of the footboard; south end of the footboard it would be, when I gave him the signal to stop. That would be on the same side that the engineer is ordinarily on when he is running his engine; he couldn't run it from the other side.

[Endorsed]: Filed May 17, 1916.

Testimony of James B. Glover, for Plaintiff.

[46] JAMES B. GLOVER, a witness called on behalf of the plaintiff having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is James B. Glover.

(Testimony of James B. Glover.)

I am timekeeper at the Modoc mine at present; I am working for the Anaconda Copper Mining Company; I have been working for them a little over two years. Before that I was in the garage business. Prior to that I was in the milk business. I knew David Clement, Jr. I knew him during the course of his time with me, probably four months, that is, prior to the accident. He was my helper on the wagon. I think the boy was in the neighborhood of 16 years old. He was probably five feet five or six, somewhere around there. As to his capacity for work—I never found him what you would say shirk his work; he was willing to do his work. I considered him a good boy. He was working for me the day of the accident. His habits were very regular; I do not know of him dissipating; I don't believe I ever saw the boy smoke a cigarette; if he did it wasn't in my presence; and his language was always proper or I wouldn't have kept him in my employ. He was a very dependable boy. As far as his strength, he seemed to me to be—well, I imagine the boy to be about 17 or 18, well, 17 years old; I didn't think he was 15 when I hired him; he had the build of a boy about 17, I imagine he weighed about 120 or 135 pounds, somewhere around there, just guessing at it in comparison with my own weight. He drove the milk-wagon for me, he assisted. The wagon was an enclosed one. It was what we call a covered wagon, on springs, it had panes in front, and panes on the side, and also panes in the door; the door you might say was like this (indicating), and the seat [47] was just about

(Testimony of James B. Glover.)

where I am sitting here in reference to the door over there; and the door was a sliding door, and in front we had milk cans, and also in the rear and also under the seat; in this particular case he had a big load; he had milk stuck on his seat, so that it was just one narrow seat. When I took the wagon one of us would sit on the milk cans. There was just one seat, milk under the seat, milk on the side of the seat, probably five or ten gallon cans or may be three gallon cans, just depended on what the trade called for; and the front we usually carried the bottles underneath and the cans on top. The wagon was a brand new wagon; it had just a few months service. I saw the condition of the wagon after the accident.

Q. How long after the accident was it before you were there?

Mr. FURMAN.—We object on the ground it is incompetent, irrelevant and immaterial; doesn't tend to prove any issue raised by the pleadings.

Mr. WHEELER.—I intend to show the distance—

The COURT.—I think he may answer as to the condition of things; it might be evidence from which the jury can infer the force of the blow; it might have some bearing on the question of whether the engineer did all that was reasonable to stop. The objection is overruled.

Mr. FURMAN.—Exception.

A. Less than an hour.

The wagon was demonished entirely; there was one wheel that was intact, outside of that it was a

(Testimony of James B. Glover.)

complete wreck. I made measurements down there. I was down there in less than an hour after the accident occurred. I am very familiar with the situation down there, because I was interested. The Milwaukee [48] crosses Montana Street, where this accident took place, just this side of the cemeteries, just northeast of the cemeteries a few feet off the corner of one of the cemeteries. There are some houses along Montana Street, some little distance south of the tracks. The first house, I measured it, or I might not remember it. I think that is my diagram that you have in your hand. I made you a diagram when I measured it. I made that diagram shortly after the accident; I don't remember what date; I was getting information for my own benefit. I showed on that diagram the distance from the first house south of the railroad track. I have got the distance here 176 feet. The railroad track comes around a kind of a curve.

Q. And did you have occasion to observe whereabouts, coming around that curve, whereabouts a person could first see an object upon Montana Street?

A. Yes, I had a man with me when we measured, and we went to this house, which was running parallel, east and west, and I got on the corner of the house and looked right direct to this railroad track, and had this party go along the track, and then I had him stand there, so that I wouldn't lose my vision, and we measured that distance, and from the house to there it was a distance, according to these figures,—whether that is accurate or not, I don't

(Testimony of James B. Glover.)

know—of 325 feet; that is where the accident was from the corner of the house; we measured from this same point where he could have seen the boy or seen the crossing where the boy crossed, was a distance of 347 feet, according to these figures here. I will take that back, he could have seen him for a distance of 600 feet. I made measurements as to how far the milk-wagon was taken past the crossing. I do not remember that now. There is a figure on this diagram of 241 feet. I think it was 241 feet to the switch, and six feet I [49] think was carried beyond the switch; I won't say positive that is right, now. That is my recollection. I made that measurement just a few days after the accident. I know the point where the boy was picked up; I think it is about midway between what is known as the switch and the track. This sketch, for a rough sketch, I should say was nearly accurate, showing the situation as it is down there at the place where the boy was killed, showing the crossing at Montana Street, and so forth. I have indicated on this diagram north, south, east and west, and also Montana Street.

Mr. WHEELER.—Now, we offer this diagram in evidence.

Examination by Mr. FURMAN.

The WITNESS.—I think I made this; I am almost sure I did; it is so long, but it seems familiar to me; I know I made one, and I think that is the one. As to my independent recollection of the facts,—there is one distance I think I am almost sure of,

(Testimony of James B. Glover.)

that is the distance from the switch—the distance the wagon was carried. The figures are not in my handwriting, but the diagram was drawn in my handwriting. I think I made a note of these; I think I gave them to somebody and they wrote them down, took them from my notes, after I drew this diagram; I think that is the way it was. I made the notes, and this diagram, I drew, I think it was in an office some place, if I remember right; I took my notes and these were placed on by somebody, I don't remember who. I do not remember the occasion for it being lettered, but I remember of drawing this diagram; I don't remember the date I drew it, to tell the truth about it, but I know it is mine. I do not remember when the figures were put on, but it seems to me they were put on at the place I used this as an example or exhibit or sample.

[50] Examination by Mr. WHEELER.

The WITNESS.—I imagine the way it happened is that I drew that in Mr. Grorud's presence up at the office or had it up there explaining it, and he wrote those figures in my presence; but at this time I don't remember of the incident.

Mr. FURMAN.—If Mr. Grorud says here in court that was what happened, I withdraw my objection.

Mr. WHEELER.—I understand he helped make it.

Mr. FURMAN.—Is that the fact, Mr. Grorud?

Mr. GRORUD.—That is the fact.

(Diagram received in evidence, and marked Plaintiff's Exhibit "A.")

(Testimony of James B. Glover.)

Cross-examination by Mr. FURMAN.

The WITNESS.—I brought a suit against the Milwaukee for the destruction of the wagon and the injuries to the team. I was nonsuited in that case. I lost the suit. I did not know David Clement, Jr. before he went to work for me. I first got acquainted with him at the ranch.

Q. Was that the first information that you had respecting him?

Mr. WHEELER.—We object to it as being irrelevant and immaterial, and incompetent, not tending to prove or disprove any issue. He says he first met him at the ranch.

The COURT.—I think so. Objection sustained.

Mr. FURMAN.—Exception.

The WITNESS.—I have a brother-in-law in this community, by the name of Congdon; that is the only brother-in-law I have.

Mr. FURMAN.—I would like to make an offer of proof.

[51] (Whereupon the following offer in writing was submitted:)

“Defendant offers to prove by plaintiff’s witness, Glover, now on the stand, that he first heard of David Clement, Junior, when the said Clement was sleeping in a barn belonging to witness’ brother-in-law, Al Congdon. That the said time was shortly prior to the time Clement, Jr., started working for witness.”

Mr. WHEELER.—We object to the offer on the ground it is incompetent, irrelevant and immaterial,

(Testimony of James B. Glover.)

improper cross-examination, not proving or tending to prove any issue in the case.

The COURT.—Objection sustained.

Mr. FURMAN.—Exception.

The WITNESS.—As to the duties of David Clement, Jr., at the time of the accident—he would bring the team in mornings to my home, residence in town, and from there we would deliver milk together. I would always meet him there or meet him between there and the ranch. The ranch is located about a half a mile west of the cemeteries. I imagine it is about a mile or a mile and a quarter from the place of the accident. We had in the neighborhood of five or six customers between the ranch and the place of the accident, that David Clement had left milk with this morning. The seat he sat in was right on the side, right on the end; it was a seat that had a back to it, with a little iron railing; it was just a narrow seat for one man to sit in comfortably; there was a back that you could swing forward or backward. The wagon was entirely enclosed, either with glass or wood.

Q. Now, what have you to say with relation to the manner in which David Clement, Jr., drew his pay, and with relation to whether he permitted his money to accumulate with you or kept it drawn up?

[52] A. Well, now, I don't remember; I believe he has drawn two or three times to get clothes, or something like that, but I don't remember, it is so far back for me to say. I do not think he had any wages coming at the time of his death; I think it

(Testimony of James B. Glover.)

was just shortly after pay-day, or something like that; we used to pay I think twice a month. He never had anything coming but what he got; we always squared all of our help.

Redirect Examination by Mr. WHEELER.

The WITNESS.—At the time of the accident the road south of the crossing there at Montana Street, that he had to go along on and up Montana Street, was in a very bad condition. The street-car company had just excavated for a track, and they hadn't filled in at the time; some of the rails were laid and some were not; it was excavated clean around to the last turn before you come to the ranch; they were waiting for rails or ties, I don't know which, and it laid that way for some time.

I know Mr. Bullwinkle, the claim agent for the Chicago, Milwaukee & St. Paul Railway Company. I have had a conversation with him recently. I had a conversation with him last night.

Q. And what, if anything, was said by Mr. Bullwinkle, at that time, with reference to settling that case of yours?

Mr. FURMAN.—We object to that, on the ground it is incompetent, irrelevant and immaterial; doesn't tend to prove any issue raised by the pleadings, and it is improper redirect examination.

The COURT.—What purpose do you think it will serve?

Mr. WHEELER.—Well, I think, may it please the Court, it is competent, if Mr. Bullwinkle went to

(Testimony of James B. Glover.)

this witness and offered to settle a case just immediately prior to the time—settle the case which he had lost.

[53] The COURT.—I think he may answer. You brought out this witness had some controversy, and the purpose was, of course, to show his interest or bias or prejudice. Now, this may tend to relieve the inference, if any such would be drawn. The objection is overruled.

Mr. FURMAN.—Exception.

Q. (Question read.) I mean what, if anything, was said by Mr. Bullwinkle, on last evening, to you, with reference to settling the case which you had previously lost.

A. I told Mr. Bullwinkle that I expected to start a new case, I think I did, and that I thought I had room for another case against them; and I think he told me if I hadn't been hasty they would have probably come to some settlement with me.

Q. Well, what, if anything, was said with reference to his settling with you at this time, or after this suit, this case, here, was over?

A. Why, he told me that they probably would be able to settle with me, or make some kind of a settlement.

Witness excused.

[54] Testimony of William Willoughby, for Plaintiff.

WILLIAM WILLOUGHBY, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is William Willoughby. I am a miner. I have been engaged in mining about thirty-five years. During that time I have been chiefly here in Butte. I am not working at the present time. I have just come back from Galen; I have been down there taking treatment for miners' consumption. On the morning of the 5th of November, 1912, I was over on Montana Street, I guess. I was going home. It was about four, I guess, in the morning, may be ten to four, just around four o'clock. I know where the Milwaukee track crosses Montana Street. I was about 150 feet away from there. I did not notice anything but the wagon coming down and the train collide. The engine was backing down. I couldn't tell how many cars were attached to it, one or two, may be ten; may be ten or twelve, I don't know. A fellow name of Chappell was on the back end of that car; I just slightly acquainted with him; I knew the man. I was acquainted with him at that time; I was living close to him, the second house from him. I do not know how fast the train was going on that morning; it was going a kind of a slow speed; of course, it was a switch-engine, may be six or seven miles an hour.

(Testimony of William Willoughby.)

The team was going just a little dog trot, you know, just jogging along.

Q. And what have you to say with reference to whether or not you saw anything done unusual by the man on the train, on the back end of the engine; what if anything was done by him?

A. Oh, I didn't see anything more than I see him signal, of some kind; I don't know; I am no railroad man myself. He had a [55] lantern; of course, I don't understand signals. I heard the train whistle up at the switch up there, right, it must have been around there by the switch. At that time it must have been a quarter of a mile, very near, from the railroad crossing; it was up around the turn there. I saw the engine strike the wagon. It just crushed it right in, just like anything else, over-powered, of course, and squeezed right to pieces. It slid on the rails possibly 150 feet, that is giving a rough estimate. I helped to take the boy out after the accident, with the undertaker.

Q. How far would you say that you took him up, with the undertaker, from the crossing?

Mr. FURMAN.—We object on the ground it is irrelevant, incompetent, and immaterial; doesn't tend to prove any issue raised in the case.

The COURT.—I think he may answer. Overruled.

Mr. FURMAN.—Exception.

Q. How far from the crossing would you say that he was—from the middle of Montana Street?

A. Oh, possibly 75 or 100 feet, I don't know just how—possibly 75 feet.

(Testimony of William Willoughby.)

Cross-examination by Mr. FURMAN.

The WITNESS.—I have never done any railroad-ing myself. I saw Mr. Chappell with a lantern in his hand; I could tell the light of the lantern. I do not know what signal he gave; I am not in the habit of knowing that—railroad signals. I just saw him, he flung his lantern, and, of course, he hopped off the back end of the engine to avoid the accident himself. I could see him jump off. That was when the lantern flashed around. I [56] knew Chappell at that time; I lived alongside of the man. At that time I suppose I was about 100 feet away; of course, I couldn't tell only by the arclight. I knew it was Chappell. I knew it was Chappell when he jumped off. The arclight was right over the crossing; he was pretty close to it when he got off. I just knew David Clement, Jr., at that time by sight, passing along the road there. I saw the wagon, of course, but I didn't see him on the inside; of course, you couldn't very well see him that way. He left milk at a sister-in-law of mine there, right directly opposite the Mount Moriah Cemetery gate. The team was going just a little slow dog trot; the train going one way, and the team, both kept going until they met.

Redirect Examination by Mr. WHEELER.

The WITNESS.—The arclight is on the south side of the crossing, possibly fifty feet away from the crossing. The rays of that arclight extend close to a block, I guess; you can see for a block away.

Witness excused.

[57] Testimony of M. J. McMasters, for Plaintiff.

M. J. McMASTERS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is M. J. McMasters. I am a switchman. I am working for the Northern Pacific at the present time. I have worked two times for them, about two years each time. On the 5th of November, 1912, I was working for the Milwaukee railroad. I was working on this train that collided with the milk-wagon and boy. The collision took place about four o'clock. I was on the rear car, I know where that curve is just before you get to Montana Street. I should say on that morning we were going six to eight miles an hour. As to what there was that was near me on the rear end of that car—the brake was there, and the retainer valve. The retainer valve is where the air escapes out after you release the air. It makes that retainer valve—it will blow to a certain extent. When he releases the brakes this retainer valve will blow at the end of the car. I have been railroading about ten years. I have had some experience and observed in what distance a train can be stopped. We had about 700 tons on that train that morning. They were boxcars and gondolas, mixed cars. I judge the grade there, around that curve, is about one-half of one per cent. I have ridden on trains when emergency stops were made. As to the effect on

(Testimony of M. J. McMasters.)

a person riding upon a freight train when an emergency stop is had—you can hear the brakes go on, and the jar of the train at the rear end. I did not see this accident. I should judge the emergency brakes were put on that morning about at the crossing; the engine was about at the crossing when they were put on. I could tell that [58] from the distance I went; from the distance it was. After we struck the crossing we went past about—I don't just remember, but it must have been four or five car lengths by the crossing.

Cross-examination by Mr. FURMAN.

The WITNESS.—I do not know just exactly the date I left the employment of the Milwaukee, about a month afterwards, I think. I quit. I have never run an engine myself. I never did any engine work; just switch cars is all. I was sitting on the last car near the brake, where the brake was on the end of the car. My feet were hanging over one side. I was facing south. I could not see what was ahead. I suppose the train was about 500 feet long, the twelve cars and the engine and tender; the cars were 40 and 36 feet apiece.

Witness excused.

[59] **Testimony of L. S. Groff, for Plaintiff.**

L. S. GROFF, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is L. S. Groff; I am a

(Testimony of L. S. Groff.)

deputy United States Marshal; I have been such since about the 11th of May, a year ago. Previous to that I was a railroad man. I had been engaged in the railroad business prior to that time about 12 years. I worked for the Northern Pacific, the Great Northern, the Milwaukee, the Denver & Rio Grande. The last shift I worked for the Milwaukee was the 23d day of December, 1914, night. Prior to that I had been working for the Milwaukee. I am familiar with switch-engine known as 1163; I worked with it. I worked as switchman, a switch foreman, and also as a night yardmaster. During my experience in railroading I have had occasion to observe in what space an engine can be stopped, and trains can be stopped in emergency situations. I know where the Montana Street crossing is in the City of Butte, on the Milwaukee. I am familiar with the grade over that crossing. The grade is about one-half of one per cent, I should judge.

Q. I will ask you, Mr. Groff, from your experience as a railroad man, in what distance you could stop an engine backing, and drawing twelve cars, carrying a tonnage of about 700 tons, over a grade of one-half of one per cent, and going at the rate of six or eight miles an hour—what distance could you stop that engine, by applying all the emergency applications?

A. Well, if the conditions were favorable, everything in first-class shape, you had ought to stop it in about fifteen feet; I should say fifteen feet. I have a fair idea of the [60] grade just east of

(Testimony of L. S. Groff.)

that crossing. The grade is about the same, I should think.

Q. Now, Mr. Groff, I will ask you, if a person is riding upon a freight train, and an emergency application is put on to the engine to stop that train, what if anything would it do to a person standing or riding upon the engine?

A. Well, if you were sitting in the position that I am in, with nothing behind you, it would knock you down; if you were standing up, the chances are it would knock you over on the floor.

Cross-examination by Mr. FURMAN.

The WITNESS.—I have been a deputy United States marshal since about May 11th, 1915. I cannot say I am very frequently associated with Mr. Wheeler, United States District Attorney. In a way I see the man, but otherwise, I am not. As to my being very friendly with Mr. Wheeler, he never done me no harm. Our relations are friendly as far as I know; he has never done me no harm.

The last shift I worked for the Milwaukee was the 23d day of December, 1914. I left the Milwaukee of my own volition. I never was notified that I was discharged.

Q. As a matter of fact you had a lawsuit of your own against the Milwaukee, for an alleged personal injury, and Mr. B. K. Wheeler was your attorney?

A. I never come to a lawsuit; it was settled out of court altogether. I claimed a certain amount of

(Testimony of James A. Brittian.)

money that was due me, and I got it. Mr. Wheeler was my attorney in that matter.

Witness excused.

[61] Testimony of James A. Brittian, for Plaintiff.

JAMES A. BRITTIAN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—My name is James A. Brittian. As to my business—I am not doing anything now. Most of my life I have followed railroading. I have been engaged as a locomotive fireman and engineer. I am familiar with the Milwaukee Engine No. 1163. I have driven that engine. I worked for the Milwaukee a little over three years. I was at that time familiar with the location of the Montana Street crossing on the Milwaukee; there has been buildings put up around there since I quit for the Milwaukee, and there may be some changes there now; at the time I run this engine for about a year. I am familiar with the grade. That grade is in the neighborhood of one-half of one per cent, I should judge, one-half or three-quarters. I was an engineer for sixteen years.

Q. I will ask you, Mr. Brittian, in what distance you could stop an engine, drawing twelve cars, composed of gondolas and boxcars, with a tonnage of 700 tons, going at the rate of six miles an hour, around a curve and across the Montana Street crossing, with the Milwaukee engine No. 1163?

(Testimony of James A. Brittian.)

A. Well, it is kind of hard to tell that exactly; it depends altogether—it doesn't depend altogether on the brakes of the engine; it depends on the condition of the braking power on those cars. Assuming that the braking power is in good condition and that the air is connected up, they ought to be stopped, with an emergency stop, in I should think twenty or twenty-five feet at least.

[62] Cross-examination by Mr. FURMAN.

The WITNESS.—As to when I quit the service of the Milwaukee, the last trip I made was on the 17th day of March three years ago. The occasion of my quitting was handling 16 roughly, in coupling onto 16 at Piedmont, with a Maley engine. I was discharged for that. I have not worked for the Milwaukee since. I have not worked for any other railroad since. I believe I am thoroughly familiar with braking apparatus. The condition of the rail has something to do with an emergency stop. Any rail that the wheel is liable to slide on, it is harder to stop on; you don't get any power at all braking, with the wheel sliding. If you can get sand on the rail, it is almost impossible to slide the wheels. If I were to make an emergency application I do not believe I would reverse the engine. I would not slide the wheels if I could avoid it; probably a person would get excited though, under the condition, that he might reverse the engine, but ordinarily I don't believe I would. It would not add to the braking power but very little, if any, to reverse the engine. If there had been a light service application to check

(Testimony of James A. Brittian.))

the speed of your train a short distance back, and a short time before you made your emergency application, you would be able to get an emergency application under those conditions. You wouldn't get as good an application right after having released your brake as you would by having your train line fully charged, but you could make a slight application previous to that and then your emergency immediately after. That would probably affect somewhat the distance in which the emergency stop could be made.

Q. Now, isn't it fact that in case there had been an application there to check the speed of the train, and then a short [63] while afterwards it became necessary to stop the train, and an attempt was made to put on an emergency application of air, isn't it a fact that the thing you would really get would be a full service application and not an emergency application?

A. Well, you wouldn't get any results at all hardly from a service application, after having had the application just previous; the only service you would get would be the emergency.

Q. But that would work out so that the emergency application itself would be no more than a service application?

A. No, I don't think so. It might not start quite so soon, but that is the only way you would get any result would be your emergency application. The fact of the service application would change my opinion about the distance in which the train could

(Testimony of James A. Brittian.)

be stopped. Under those conditions it would be as perfect braking conditions as you could get, but you wouldn't get what you would get if you hadn't made the previous application.

Witness excused.

Mr. WHEELER.—We rest. That is our case, your Honor.

The COURT.—Proceed for the defense.

Testimony of J. E. Woods, for Defendants.

[64] J. E. WOODS, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is J. E. Woods. I am in the employ of the Milwaukee railroad. I have been in their employ since May, 1912. I have worked for the Milwaukee railroad as a boiler maker, helper and engine despatcher, before I was hired as an engineer. Prior to my working for the Milwaukee I had from 1906 the position as engine wiper, fireman, engineer, for the B. A. & P. Railway. I was born in Missoula, Montana. My home is at Deer Lodge at the present time. I was engineer for the Milwaukee on the morning of the 5th day of November, 1912. I was working in the Milwaukee yard, in south Butte, that morning. I had engine 1163. It is what we term a switch-engine, with foot-boards on each end, and a kerosene headlight on each end. For practical purposes it didn't make a bit of difference whether the engine was going ahead or backwards. That morning the engine was

(Testimony of J. E. Woods.)

headed east, we were backing west. We were pulling a train behind. There is no difference in the appearance of the two ends of the engine, only the rear end has what they call a sloping tender on it; you can sit up in the cab and look right over the back of that tender. I have been in the courtroom during the progress of this trial. I have heard the testimony relating to the collision with the milk-wagon in which David Clement, Jr., was riding. I was the man running that engine that morning. I was sitting on what we call the right-hand side or the south side of the engine; I was facing the front of the engine. The train consisted, I believe, of coal and coke, of twelve cars. The total gross weight of the [65] train was 700 or 750 tons, I should judge. The train was made up in the yard, about a quarter of a mile east of there. We were to transfer this stuff to the B. A. & P.

Q. What if any signals did you give approaching this crossing; first with reference to the whistle?

A. Well, I sounded the whistle, one long and two shorts, I should judge about 300 or 400 feet from this crossing. One long and two short is the regular signal of alarm according to the Milwaukee code of rules. That signal is to warn people when you are approaching the crossing. It is the regular crossing whistle of the Milwaukee. That is the whistle I gave, one long and two short. The bell was ringing. I had a fireman by the name of Byers; I think he is dead at the present time. It was a clear, frosty morning. The accident happened about four o'clock.

(Testimony of J. E. Woods.)

Q. Did the engine, as it approached the crossing, make any other noise besides the noise of the whistle, bell, or the rattle of the iron on the rails?

A. Yes, we had what we term a blower on the engine, that is, a force draft on the fire-box; the engine wasn't steaming very good, and was leaking, and we had this force draft on the fire because it is a hard pull to get to the B. A. & P. transfer with this many loads with that engine. That makes quite a noise. On a morning like that I should judge it could be heard a quarter of a mile.

Q. Now, then, will you just describe the Milwaukee track, in its general appearance, for the distance of a few hundred feet east of the crossing on Montana Street in south Butte?

A. Why, it comes around a curve. When I got within about 150 feet or 200 feet of the crossing I see a team driving up there along the road. The team was approaching at a pretty [66] fair trot, I should judge the team was going five miles an hour. It was a covered wagon. I did not see any driver then. I first saw the occupant of the wagon after we stopped and I got off of the engine and went back and met Mr. Chappell, and we went back to where the boy was laying between the cars; that is the first time that I saw anybody.

Q. Now, then, will you tell us what if any applications you made of air, or what manipulations you made of the braking apparatus that morning, prior to your stop after the accident?

A. Why, I had just made a seven or ten pound

(Testimony of J. E. Woods.)

brake power reduction to take this slack up to take this curve. Prior to this reduction we were going eight miles an hour, anyway. We slowed to six miles an hour, about six miles an hour, I should judge.

Q. And what further application of air did you make?

A. Why, I didn't—I released this and didn't make no more applications of air until I see the team wasn't going to stop, and then I used the emergency, about 75 feet from the crossing.

Q. When you first observed at this point, 75 feet from the crossing, that the team showed no signs of stopping, now tell the jury everything that you did?

A. Well, I done everything in my power to stop the engine; that is, I throwed the air in the emergency; that is all that I could do. At that time the bell was ringing; the bell was ringing at the time of the collision. I observed the rails after the accident; when I got off the engine I noticed they were frosty. I did not use sand that morning; it was on a curve; there was no use using sand, on account of the pipes are bent so that it would just throw it to the side of the rail.

Q. Did you give any further signal with the whistle after the regular crossing whistle sounded at a point 400 or thereabouts, [67] feet east of the crossing?

A. The bell ringing, that was all. I was not able to see the lines on the horses' backs until I got within about 75 feet of them. They were then slack. I

(Testimony of J. E. Woods.)

observed the team at that point, 75 feet away. There was no sign of any freight or anything on the part of the horses. They did not slacken speed at all until the very time of the accident. The team were coming from the south, going north. The team went in a generally northerly direction right on the crossing, and I went in a general westerly direction until the accident happened. I should judge the body part of the wagon was hit by the locomotive. There was as good a view of my train as I had of the wagon.

Cross-examination by Mr. WHEELER.

The WITNESS.—There is a house right in the middle of that curve. After I got around that curve, around the house, I could see the crossing. I testified I was about 150 or 200 feet from the crossing at that time. I did not measure it. From the time I saw this rig I kept my eyes on it. At no time did they make any effort to stop the rig that I know of. I couldn't tell whether he was going to make any effort or not to stop until I got up where I could see the lines. Up to that time he hadn't made any effort to stop, that I know of. I knew Mr. Chappell at that time. He had charge of the engine. I was to take orders from him, upon his giving me any signals, as far as it was safe. He gave the signal to leave the yards when he got on the engine. I did not see him from that time on until he jumped off at the crossing. He is supposed to stand on [68] the footboard, off to the side, and hold his lamp out there where I can see it. I was on the south side running the engine on that morning. The first time that I

(Testimony of J. E. Woods.)

appreciated the boy was in danger or the person with the team, if anybody, was in danger, was when I was 75 feet away from the crossing. I put on my brakes at that time. As to going past that crossing a distance of something like 241 feet—I don't know what it was; I think I said two or three car lengths. I could not say that I went past that crossing 241 or 247 feet, because I did not measure it. I don't know how far I went past it. I did not leave my engine that morning before it stopped. We went by one switch; we went by the first switch west of the crossing.

I have been an engineer since 1909, three years at that time, I guess. I had been working for the Milwaukee since August 22d, I believe. The accident occurred in November. It wouldn't have done no good to use sand around that curve; the pipes are bent so that it would throw the sand on the side of the rail, around a curve. None of the sand would have struck on the rails. I do not know whether it is a fact that the track is almost practically straight for a distance of 75 or 100 feet east of the crossing; I think it comes to a curve right to the crossing. The only whistle I blew was the distance of three or four hundred feet east of the crossing. I gave the ordinary crossing whistle. The rules of the company provide that that whistle shall be given something like 400 feet east of a crossing. In the event that you see an object upon the track, and you see they are not going to stop, and you have got time, you blow a lot of short whistles to warn them. I

(Testimony of J. E. Woods.)

blew no short whistles on this morning. When I saw he wasn't going to stop, I didn't have time to do anything else only apply the emergency [69] and did all I could to stop. I saw the team coming just as soon as I got out of the shadow of that house; I couldn't state how far that was from the railroad track; I didn't measure it. As to there being other railroad tracks in that neighborhood—the street-car I believe crosses the railroad track there. There are no other railroad tracks in that close proximity to the Milwaukee that I know of. The Northern Pacific track is probably a half a mile, or more, I should judge.

Redirect Examination by Mr. WHEELER.

Q. Now, at four o'clock, just prior to four o'clock, could you see Chappell where he was standing on the footboard?

A. No, I did not see him. He did not give me any signals at that time. I saw him for the first time, after he got on the train to go, when he jumped off at the crossing.

Witness excused.

Testimony of A. A. Grorud, for Defendant.

[70] A. A. GRORUD, called as a witness on behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is A. A. Grorud. I am Mr. Wheeler's law partner. I am interested in the disposition of this lawsuit. I went with Mr.

(Testimony of A. A. Grorud.)

Glover to take the measurements that are indicated on Plaintiff's Exhibit "A." Those measurements are put in in my handwriting. Mr. Glover drew the diagram, as near as I can remember. I held one end of the tap that was used that day, I think.

Witness excused.

Testimony of George T. Spaulding, for Defendant.

[71] GEORGE T. SPAULING, as witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is George T. Spaulding. I am traveling engineer for the Milwaukee railroad. I have occupied that position about five years. My duties are looking after the locomotives and the engine men generally. I have been in the railway service about 18 years; in the capacities of wiper, fireman, locomotive engineer, traveling engineer. I ran an engine between seven and eight years, in Iowa, Dakota, North and South Dakota, and Montana. I have not run engine for any other road but the Milwaukee; I fired a little for the Great Northern. I am familiar with the operation of braking apparatus. I know 1163, a switch-engine in the Butte yard. I am familiar with the braking apparatus on that engine.

Q. I will ask you to assume, Mr. Spaulding, the following statement of facts, which will constitute a hypothetical question. Assume that 1163, headed east, is backing to the west, drawing behind it 12

(Testimony of George T. Spaulding.)

loaded cars, with a total gross weight of 700 tons, at a rate of 8 miles or more per hour, at a distance of some 3 or 300 feet eastward from the street crossing of Montana Street, South Montana Street in the city of Butte, the track curves gradually to the southward, and the grade is from one-half to three-fourths of one per cent; a service application from 7 to 10 pounds is made to check the rate of speed of the train, preparatory to taking the curve; that service application is kept on until the speed of the train is *check* to six or less miles per hour; shortly thereafter, and a distance of 200 [72] feet or thereabouts farther to the west, and at a point approximately 75 feet or thereabouts, east of the crossing, the engineer discovers that there is a possibility of collision and undertakes to make an emergency application. The hour is four o'clock in the morning; it is the 5th day of November, and the air is clear; the rail is frosty; it is on a curve, under conditions in which no sand can be applied to the rail; the speed is approximately six miles an hour. In view of these conditions and under such circumstances, assuming them all to be true, what have you to say would be the reasonable distance within which that particular locomotive, under those conditions, could stop the train as described.

A. This first preliminary application to slow down had been released shortly before the application?

Q. It had been.

A. I should say from 150 to 175 feet. I reach that conclusion as a result of my observation.

(Testimony of George T. Spaulding.)

Cross-examination by Mr. WHEELER.

Q. Mr. Spaulding, assume that a switch-engine, 1163, is backing westward, pulling a train of 12 cars, loaded cars, with coal and coke, the total estimated weight of the train being 750 tons; and assume that it is going from the Butte yards to the Butte, Anaconda & Pacific transfer, and at a point estimated 150 feet east of Montana Street crossing, on a grade of one per cent, and upon a curve, the train is going at that time at a rate of speed estimated at eight miles an hour, and at that time the service application is made from 7 to 10 pounds' pressure, and continued for a known space, and then is released, and the train runs a little farther and then at a point 75 feet east of the crossing the emergency application is made, and [73] it is a clear, cold, crisp morning, and the rails frosty at the time that the emergency brake is applied or the emergency application is applied; the speed of the train is approximately six miles per hour; in view of these conditions in what space would you say it was reasonably probable that the train,—that a train could be brought to a stop?

A. I should say 150 feet.

I testified in a trial in which David Clement, Administrator, was plaintiff, and the Chicago, Milwaukee & St. Paul Railroad Company was defendant, growing out of this same accident. That very same question was asked me by Mr. Furman on direct examination at that time and in this courtroom at that trial. To the best of my memory my answer at that time was, "Well, I should say ninety feet; it would

(Testimony of George T. Spaulding.)

run upwards of ninety feet." That was my testimony at the former trial.

The sand is not used mostly upon the Milwaukee engines upon the curves. That is not the reason that sand is placed in the engines to be used largely when you are rounding curves. Same is used to some extent when rounding curves on the Milwaukee. I am familiar with Engine No. 1163.

Q. And I will ask you if it isn't a fact that on Engine No. 1163, if sand had gone down through the spout or whatever it is, the pipe, that it would have struck the rail in rounding the curve?

A. It may have, some of it struck the rail. If you use sand in connection with your emergency brake you can stop it in a less space of time than you could otherwise. If you released from the tank from seven to ten pounds of air, it would take upwards of 25 seconds, perhaps 30, 35, to refill that tank.

Q. Now, assume that you were going at a rate of six miles an hour, and that you were using engine No. 1163, that your [74] braking power was in good condition, and that you had 12 cars attached to that engine, 1163, and had an approximate tonnage of 700 tons, and the train was going over a grade of one-half of one per cent, and you used every means at your command, in what distance would you say that that train ought to be stopped?

A. Seventy-five feet.

Q. Well, isn't it a fact that you have seen, on numerous occasions, a train consisting of 12 cars, loaded gondola cars and ore cars loaded, being drawn

(Testimony of George T. Spaulding.)

by the same type of engine as 1163, and have seen them stopped in a space of from 15 to 25 feet?

A. Never.

I have never lived here. The grade from the Great Northern Railroad station in Butte over to the Butte, Anaconda & Pacific deposit, I should say was perhaps two-tenths of one per cent. I do not believe you could stop a train similar to the one you have described going over that track, in from 15 to 25 feet, going at six miles an hour. Six miles an hour is jogging right along; it is going a little faster than the ordinary walk.

Q. Now, would you say that going along with 12 cars, similar to the ones that have been described to you before, with 700 tonnage, and going at six miles an hour, over a grade of one-half of one per cent, with engine 1163, a switch engine which weighs, as I understand it, 65 tons, and you used your emergency and sanded the rails, would you say you couldn't stop that engine in less than 75 feet?

A. Yes, if you had the pipes of sand available, perhaps you could a little less; not a great deal less than that. You could not stop it in 40 feet. I have not made any particular tests since this accident on this particular piece; I have rode engines. The braking power on that engine was normal. [75] I was familiar with the breaking power of that engine at that time.

Q. I will ask you, Mr. Spaulding, this question,—it is practically the same. Would you say that going along with 12 cars, at the rate of six miles an hour,

(Testimony of George T. Spaulding.)

over one-half of one per cent grade, with an engine similar to 1163, a switch-engine, weighing 65 tons, and you used the emergency and sanded the rails, that you could stop it in a less distance than 80 feet?

A. Yes, sir.

Q. In what distance would you say that under those conditions that you could stop it?

A. 75 feet.

Q. Now, I will ask you if you didn't state, at the time that you testified at the former trial in this court, in the case of David Clement, Administrator, vs. Chicago, Milwaukee & St. Paul, et al., that your answer to that question, the identical question that I have just asked you, was not, "Perhaps ten feet, probably seventy feet."

A. I can't remember. I perhaps gave that testimony. I would say I was wrong, then, owing to the experience since that time. My experience convinces me that I was wrong at that time. As to whether is a rail as used several times with trains, it isn't very apt to be frosty—it is owing to how recently or how short a time previous that trains had passed over.

A track that was not used very much would be much more inclined to be frosty than one that was used several times of a night. If several trains ran over a track during the night it isn't very apt to be very frosty.

[76] Redirect Examination by Mr. FURMAN.

Q. In response to a hypothetical question asked you by me in this courtroom two years ago, in the case in which David Clement, as Administrator of the Estate

(Testimony of George T. Spaulding.)

of David Clement, Jr., deceased, was plaintiff, and this Milwaukee Railroad was the defendant, you responded to the hypothetical question that under given conditions, which are substantially the same as those I gave you now, a train would stop in about 90 feet, it would run upwards of 90 feet. Now you say from 150 to 175 feet. What have you to say with reference to the discrepancy between your testimony of two years ago and your testimony to-day?

A. I have had more experience in regard to the recent release just previous to an emergency application, in effect on the emergency application thereafter. The estimate that I made two years ago, of ninety feet, was rather short.

I know the grade east from Montana Street crossing; it is fifty-hundredths of one per cent, for a distance of 300 feet, and then it goes a number of hundred feet $75/100$ or three-fourths of one per cent; ascending going east, descending approaching the crossing. I am fairly familiar with the grade of Montana Street north and south from the crossing. The ground is slightly sloping to the north, if I am not mistaken. I could not state when I looked at that last; I take the car there occasionally; I observe the car approaching from the south, that is my only means of knowing. For 150 or 200 feet to the south, my judgment is that the road slopes slightly towards the track.

Recross-examination by Mr. WHEELER.

[77] The WITNESS.—I was working for the Chicago, Milwaukee & St. Paul Railway when I tes-

(Testimony of George T. Spaulding.)

tified in this courtroom two years ago. I was working in the same capacity at that time that I am now. I have been running engine every day since that time,—different engines. At that time I had been working the same period as an active engineer that I have now. I have been working as an active engineer about eight years.

Witness excused.

Testimony of A. B. Ford, for Defendant.

[78] A. B. FORD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is A. B. Ford. I reside at Great Falls. I am a locomotive engineer. I have been in the railway service since 1892; during that time for the Great Northern and Northern Pacific. I have worked as machinist apprentice, machinist, locomotive fireman, engineer, traveling engineer, and master mechanic. I worked about four years as an engineer; about five years as a traveling engineer, about twelve years as master mechanic. During that time I have had occasion to observe and operate the braking apparatus on locomotives. I am familiar with the braking apparatus that is used on trains and locomotives.

Q. I will ask you, Mr. Ford, to accept as correct, this following statement of a hypothetical question: a switch-engine, weighing 65 tons, or thereabouts, with a sloping tender, an oil headlight in each end,

(Testimony of A. B. Ford.)

footboard at each end, headed west, is pulling a string of loaded cars, 12 in number, of a total gross weight of from 700 to 750 tons, down a grade which is 51/100 of one degree, around a curve, which will be, as you go west, a left curve, at a speed of eight miles per hour; approaching the curve a service application of air is made, of seven to ten pounds' pressure, which is maintained for a sufficient period to check the speed of the train from eight to ten miles an hour down to six or less miles an hour; thereafter, after a short interval of time, and when the engine is perhaps 200 feet farther to the west, and at a point 75 feet east of the street [79] crossing, the engineer observes the possibility of a collision, he seeks to make an emergency application to stop his train. In view of these conditions, under the situation that I have outlined, what would you say was the reasonably probable distance within which the train could be brought to a stop? No sand could be applied to the rail because of the fact of the curve in the track; the rail is frosty, the morning is clear and cold. Now, what would you say would be the reasonably probable distance in which the train could be brought to a stop under those different conditions?

A. Considering that he made a service application just before he endeavored to make an emergency application, it would be almost impossible to say just how far his train would go, as he could only get an ordinary service application, which is 20 pounds, and the brake cylinder pressure would have been reduced, so that he couldn't get a full service brake cylinder

(Testimony of A. B. Ford.)

pressure,—I would estimate the train would go from 150 to 200 feet. It is not possible to get an emergency application shortly after a service application has been made. As to how long a period of time it would take for the apparatus to come again into the position that would enable you to make an emergency application, after you make your service application—it depends on the number of cars; under the conditions, the 12 cars, I should say 30 or 40 seconds.

Cross-examination by Mr. WHEELER.

The WITNESS.—Supposing that the rails were not frosty, and that you sanded the rails, under the same speed, you could stop that engine in 60 or 75 feet, something like that.

Q. Now, assume, under like conditions, that you hadn't made [80] any service application in the first instance, and had sanded the rails, and that the rails were not frosty, what distance would you be able to stop it then?

A. The same emergency application?

Q. Well, the other time I ask you, I said assuming that you had drawn off the 7 to 10 pounds?

A. I don't understand that question that way.

Q. So that you would say that going at the rate of 6 miles an hour, a train drawing 12 gondolas, or 12 cars loaded, 700 tons, over a grade of one-half of one per cent, you would say that it would take 60 to 75 feet in which to stop it?

A. If you had sanded the rail, as you specified.

Q. Would you say it would take 60 to 75 feet?

A. For an emergency application. I don't be-

(Testimony of A. B. Ford.)

lieve you could stop it in any less than that distance, and perhaps more.

I never saw engine No. 1163. I never saw the Montana Street crossing and the grade there. If you draw off from 7 to 10 pounds of air, to equalize would take about 25 seconds; to recharge would take 30 or 40. If you put on a service application and stopped the train from running from 8 down to 6 miles an hour, and you put on a service application and drew down 7 to 10 pounds of air, it would take about 40 seconds to fully recharge. After you had fully recharged then you could make your emergency application, just the same as you could before. Under the conditions referred to in this testimony, I believe it would take 7 to 10 pounds of air to stop it or slow it up to six miles an hour. The frosty rail would make that condition; a frosty rail means when cars run over it it is greasy; what the railroad men term greasy. At that time of the year, the frost coming on the rail, the friction of the wheels running over [81] the rails creates grease or moisture, what is termed a greasy rail. As to whether if several trains ran over the track in that night it would be as apt to be frosty—as it would otherwise be,—I couldn't tell, but I think it would be greasy; I think it would be moist. I don't know why it wouldn't be frosty even if several trains had run over during the night. If there were several trains close together, it might have some bearing, but far apart, I doubt if it would. It would be practically the same if one ran over it to-day and another one ran over in a week. I have been

(Testimony of A. B. Ford.)

working on the Great Northern between here and Great Falls. I am familiar with the various types of engines. We have no engines of the number of 1163. I am not familiar with the switch-engine of the Milwaukee. I cannot say whether there is any difference between the switch-engines of the Milwaukee and those of the Great Northern; I never looked up their details on their power. I have never worked for the Milwaukee.

Q. I will ask you if it isn't a fact that you can sand all of the curves on the Great Northern track between Butte and Great Falls, with the sand from the engine?

A. Not if the engines have a lateral; that is, wear on the driving-box, so that the engine will move over to one side of the rail, and allow the sand to go inside of the rail and outside of the rail. We get some sand on the rails going around curves.

Witness excused.

Testimony of W. G. Ward, for Defendant.

[82] W. G. WARD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. FURMAN.

The WITNESS.—My name is W. G. Ward. I knew David Clement, Jr., in his lifetime; I chummed with him. During the time he was at the Industrial School I went out to see him; I think the first or second Sunday after he was out there.

Q. Now, what if anything, did he say to you with

respect to leaving his father's home?

Mr. WHEELER.—Just a moment. We object to that as being irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

The COURT.—Sustained.

Mr. FURMAN.—Exception. May it please your Honor, we want to make an offer of proof.

Thereupon, the following offer of proof, in writing, was submitted by counsel for the defendant:

“Defendant's offer to prove by defendant's witness W. G. Ward, now on the stand, on the stand, that David Clements, Jr., told him at the Industrial School, on the first or second Sunday after Clements, Jr., was committed there that his father, David Clements, had kicked him out of the house and would not permit him to live at home any longer.”

Mr. WHEELER.—We object to it, on the ground and for the reason it is irrelevant, immaterial and incompetent, hearsay, not tending to prove or disprove any issue in the case.

The COURT.—Objection sustained.

Mr. FURMAN.—Exception.

[83] Mr. FURMAN.—Now, we have an instrument we are going to offer in evidence.

(The said instrument so offered in evidence is in words and figures as follows, to wit):

“In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

In the Matter of DAVE CLEMMENTS, Alleged Juvenile Disorderly person.

COMMITMENT.

Be it remembered that on the 3d day of May, 1912, a complaint was filed in the office of Justice of the Peace Charles Foley, charging the above-named Dave Clemments, with being Juvenile Disorderly Persons, and the same having been duly certified to and heard this day by this Court in the presence of said defendants: it is

ORDERED, ADJUDGED AND DECREED, that the said Dave Clemments, *are* Juvenile Disorderly persons.

II. That said Dave Clemments, be, and *they are* hereby committed to the Industrial School, established in School District No. 1, in the City of Butte, Montana, until discharged according to law.

Done in open court this 3d day of May, 1912.

MICHAEL DONLAN,

Judge.

The State of Montana,
County of Silver Bow,—ss.

I, John J. Foley, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for said County, do hereby certify that the foregoing is a true and [84] correct copy of the judgment of said court, duly made and entered

(Testimony of J. A. Brittian.)

of record, in the above-named matter, as truly taken and copied by me from the records in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 3d day of May, 1912.

JOHN J. FOLEY,

Clerk.

By D. W. Lewis,

Deputy Clerk.

[Court Seal].”

Mr. WHEELER.—We object to it on the ground and for the reason it is irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

The COURT.—Objection sustained. The matter was heretofore testified to orally.

Mr. FURMAN.—Exception. The defense rests.

**Testimony of J. A. Brittian, for Plaintiff,
(Recalled in Rebuttal).**

[85] J. A. BRITTIAN, a witness heretofore called on behalf of the plaintiff, recalled in rebuttal, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—I am familiar with curves. As to how much of a curve it is going around on the east side of Montana street there just before you get to the crossing—I cannot give it probably as a civil engineer would give it, but it is about a six degree curve, between five and six degrees.

On that degree of curve, most of the sand going

(Testimony of J. A. Brittian.)

down through the pipes upon that engine would light on the rail.

Witness excused.

Testimony of L. S. Groff, for Plaintiff (Recalled in Rebuttal).

[86] L. S. GROFF, a witness heretofore called on behalf of the plaintiff, recalled in rebuttal, testified as follows:

Direct Examination by Mr. WHEELER.

The WITNESS.—I am familiar with the pipes that let the sand down upon engines, and particularly upon engine 1163. As to whether the sand would strike the track when it came through the pipes on engine 1163—I should think it would all be able to go on the rail down there. I could not tell *tell* what the curve is down there; that is, I am not familiar. It is a very slight curve. At a point 75 feet east of there, east of the crossing, it is practically straight.

Cross-examination by Mr. FURMAN.

The WITNESS.—I never ran this engine myself. I worked with it. I was a yardmaster, and foreman on that engine; I was foreman on that engine for a long time. I wasn't working that morning.

Mr. WHEELER.—We rest, your Honor.

TESTIMONY CLOSED.

Whereupon, an adjournment was taken until the next day, Thursday, May 18, 1916, at ten o'clock A. M.

**[87] Motion for Order Directing Jury to Return
Verdict for Defendants.**

Now comes the defendants at the conclusion of the taking of testimony in this case and after counsel for the respective parties have announced that they rest, and move the Court for a directed verdict on behalf of defendants herein upon the grounds and for the reasons following, to wit:

I.

There has been a total failure of proof on the part of the plaintiff to establish any act of negligence or to establish any omission of ordinary care on the part of the defendants.

II.

The plaintiff has totally failed to prove the discovery of plaintiff's intestate, David Clement, Jr., in a place of peril.

III.

Plaintiff has totally failed to prove that after David Clement, Jr., came into a place of peril there was any failure on the part of the defendants or any of them to exercise ordinary care.

IV.

It appears affirmatively from the evidence that after plaintiff's decedent, David Clement, Jr., came into a place of peril and of danger no interval elapsed during which time it was possible for defendants, or any of them, in the exercise of ordinary, or any other degree of care, to avoid injuring and killing David Clement, Jr.

[88]

V.

It appears affirmatively from all of the evidence that the negligence of plaintiff's intestate, David Clement, Jr., concurred with the negligence of the defendants up to and producing the injury, and no recovery can be had in this case for under such circumstances there is no room for the application of the doctrine of the last clear chance.

Attorneys for Defendants.

[89] I think this is a case that must go to the jury for their determination. It would appear that according to the engineer's own testimony, and really that is the only testimony in the case in reference to when the engineer first saw the boy and first appreciated the boy was in danger, he first saw the boy when he came around the curve, saw the team and from that time kept his eyes on the team all the time. The team was going about 5 miles an hour, he was going about 8; he was some 330 feet possibly from the crossing. These two vehicles, the train and the team, were converging somewhat on an angle point to the crossing, he was going about 8 miles with the train. Taking his statements and perhaps from general testimony, he made some application of air as he came around the curve for the purpose of taking the curve which reduced him to about 6 miles. All Chappell could do amounted to nothing because Chappell couldn't stop the engine, couldn't say where the engineer, couldn't see. The engineer says it was 75 feet from the crossing when he appre-

ciated there was something wrong and he saw the lines were slack. He appreciated the team wasn't going to stop as the lines were slack. He could see that when 75 feet away. The team was probably a little nearer the track as the train was going a little faster yet the team beat the train slightly to the crossing. He says at that time he put on all the air he could, threw the brake into emergency any way 75 feet from the crossing. Now there is plenty of evidence that, if he had done what he says he did, he would have stopped short of the crossing and would not have come into collision with the boy at all. Even Chappell says, if he had used sand and the brakes were in good condition, and we would have a right to presume the brakes were in normal condition and have a right to presume that the railroad would run trains properly equipped,—Chappell says he could have stopped 25 or 40 feet which would have been enough to avoid the collision. Groff says he should say he could stop in 15 feet if everything was in a first [90] class condition, and he had a right to presume the brakes were in a normal condition. Brittain says, stop should be made from 20 to 25 feet. Of course the testimony or evidence for the defendant, I say of course in that I mean it would inevitably be so, the evidence for the defendant is by Spaulding that if the rails were frosty and not sanding the track it was reasonable and probable that it could be stopped within 150 or 175 feet. There is some evidence that the rails were frosty, and there is also some evidence that trains had passed over, nothing positive, but some evidence that the trains

did pass over and left the rails in a greasy condition. Again that will be for the jury to pass on. Spaulding also says that he had never seen any stops in 15 or 25 feet under such circumstances, but if sand were used perhaps the train would have been stopped in less than 75 feet but not in 40. Of course that even might have saved the boy. On the other hand even if it had left the collision the blow might have been so slight as to injure the wagon but might not have injured the boy at all or done any particular damage. Of course if sand had been used it would have decreased the speed of the train. An inference that might have been drawn is that the train might have entirely cleared the crossing. He did admit here at a former trial. He said that perhaps the train might have been stopped in 10 feet, probably in 70 feet. He said, "Perhaps I testified that way, I can't remember." The he says, "If I did I was wrong." I think he assumed then he did testify that way. He said, "I was wrong, I know it now from subsequent experience." Witness Ford says that 75 feet under the circumstances, track not sanded, and with frosty rail would be a reasonable and probable distance in which a stop could be made. Almost impossible to say as after having made surface application he could only get thereafter an ordinary surface application. Other witnesses were speaking in view of the previous slight surface application made in coming around the curve. Ford says he would describe [91] it going about 150 feet after surface application as it would take some seconds to fill up after the emergency had been ap-

plied, about 30 or 40 seconds. If rails were not frosty and sand were used stop could not be made under 60 or 75 feet with surface application. Did not believe he could stop any less. The Court appreciates the only question he is, and I suppose counsel does too, did the engineer do all that should have been expected in case of ordinary care after he appreciated the boy was in danger, or was he negligent in making up his judgment and waited too long? I don't think so, no reason to make that presumption. The engineer has a right to the presumption that the boy would stop. The railroad has a right of way and only when he appreciates the fact that there is danger he has got to make preparations to stop. He appreciated that fact when 75 feet from the crossing, he couldn't tell at 330 feet away. The railroad couldn't be expected to look out for everyone, they are expected to look out for the train. Often teams are driven up very close to the track. In this case there was no evidence of fright on the part of the team. The engine must have been running at 10 or 12 feet a second not over 9 feet a second. At the rate of 6 miles an hour it couldn't have been going that fast, if the engineer speaks truly. The collision must have been due to the air in the emergency, it did not go on until about the crossing. Mc Masters said, when he felt the brakes go on he was a few feet away from the crossing. He evidently meant a few feet away, he did not mean 75 feet. He judged that from the distance it was on the rear of the train which was travelling. His judgment was not good in stating where he was. Yet

that is for the jury to say. The emergency did not go on until about the crossing. If that is true, the question is whether the engineer did, when at 75 feet, exercise ordinary care in stopping, or whether he took a chance that the wagon would beat him over. Again that is only for the jury to [92] say. 9 seconds it must be admitted, 8 seconds from the time the engineer appreciated the danger, if he appreciated it at 75 feet, as he says he did, until they reached the crossing is pretty small time for taking steps to prevent a collision. Yet they are accustomed to emergencies and are not supposed to become excited. He did everything he could. The chances are he did not do wholly everything he could, an engineer does not have to do wholly everything he can. It is for the jury to say how much he could have done. The only question is did the engineer do all he could to prevent this collision after he appreciated the danger. It has nothing to do with the codes, but did he do all he could in the 9 seconds.

The motion will be denied.

Exception will be noted.

After argument by respective counsel the Court charged the jury:

[93] Thereupon, the jury, in charge of a sworn bailiff retired to consider of their verdict; and afterwards, on the 19th day of May, 1916, the jury returned into court with their verdict signed by their foreman, which verdict is in words and figures, as follows, to wit:

[Title of Court and Cause.]

We, the jury in the above-entitled action, find our verdict in favor of the plaintiff and against the defendants, and fix his damages in the sum of \$2500.

A. T. MORGAN,
Foreman.

To which verdict defendants then and there duly excepted.

That, thereafter, on the 19th day of May, 1916, the said verdict was filed by the clerk of said court in said cause, and thereupon the said jury were discharged from further consideration of the case.

That, thereafter, on the 22d day of May, A. D. 1916, the Court entered judgment on the verdict in favor of the plaintiff, to which order of the Court and judgment entered, counsel for defendants then and there duly excepted.

That, thereafter, on the 22d day of May, 1916, the Court granted the defendants thirty days in addition to statutory time in which to prepare and serve the proposed draft of bill of exceptions in said cause.

WHEREFORE, the defendants above named pray the Court that the foregoing bill of exceptions may be settled and allowed as and for a bill of exceptions showing all the evidence given on its said trial and the proceedings had therein.

SHELTON & FURMAN,
A. J. VERHEYEN,

Attorneys for Defendants.

[94] The COURT.—Gentlemen of the Jury, you have heard the evidence and the arguments in this

case, and it is now the time for the Court to deliver to you what is termed the instructions, mainly, the law that governs in cases of this sort,—the law that governs the rights of the parties, and the law that must guide you in determining your verdict in the case. You will remember that the jury always takes the law as given to them by the Court; the reason is that the Court always declares the law the same, so then cases are always tried according to settled law, for, if juries were free to take their own view of the law, one jury might have one view to-day and another jury a different view to-morrow, and a third jury still a different view on the third day, and so cases would not be tried according to the law as it really is, but in accordance with the different views that different juries might think it was, so your oath and your duty of course is to take the law from the court, but when it comes to what are the facts in the case, what does the evidence prove, or tend to prove, and what inferences of fact ought to be drawn from the evidence in the case, that is exclusively for you. You are responsible for a correct determination of the facts arrived at, in view of the rules of the law that the court gives to you; even if the Court should express an opinion upon the facts,—should say to you that it looks to it as though this were proven or that not proven, you are never bound by the opinion [95] of the Court on the facts, though, of course, if it coincides with your own opinion, you are not to reject that conclusion for the reason that the Court agrees with you in what the evidence proves. So remember that the Court is responsible for the law,

and that you take the law from the Court, and you are responsible for the facts.

This case is one wherein the plaintiff sues as the father of his deceased son; he sues the defendant, alleging that on a certain day in this city, the deceased boy was driving along the road coming to a railroad crossing, and that the defendant's servants saw the boy in time to have prevented the train from injuring him, and that instead of preventing the train from injuring him when they could have, they negligently and carelessly drove the engine against the team and the wagon and killed the boy, and the plaintiff says that because of that he has lost the boy's services from that time until the boy would have arrived at twenty-one years of age, and so the defendants are liable to him in the damages he has thereby suffered.

The defendants' answer to this deny that they were negligent at all, or that they, or their servants, were guilty of any negligence at that particular time. Under those circumstances, the burden is on the plaintiff to prove to your satisfaction, by a preponderance of the evidence, that the defendants were negligent, as he charges in this complaint. When I say the plaintiff must prove it by a [96] preponderance of the evidence, I mean by the greater weight of the evidence. If, on the other hand, the plaintiff has not proven by the greater weight of the evidence the negligence that he charges against these defendants, he fails in his case, and your verdict must be for the defendants. If, in your judgment, after you

have cast up all of the evidence in the light of the rules of the law that the Court will give to you, it seems to you that the evidence is evenly balanced, then the plaintiff has failed to produce a greater weight of the evidence, and again your verdict would be bound to be for the defendants, because it is not enough for a man to come into court and allege a cause of action against a defendant, but he must also prove it,—prove it to the satisfaction of the jury by the greater weight of the evidence. Of course, if the greater weight of the evidence is with the defendants, then the plaintiff has equally failed, and your verdict must be for the defendants. But if the greater weight of the evidence is in favor of the plaintiff, he is entitled to a verdict at your hands, and you are bound to render it to him.

When you come to consider the evidence and weigh it, you will remember that the credibility of all witnesses is for you to determine; that also is your province. You are to determine which witness tells the truth, which, in your judgment, is most likely to tell the truth, and you are to determine how much weight you will give to any and all evidence [97] of the witnesses; you are to determine what inferences you will draw from circumstances that seem to you to be proven by the greater weight of the evidence. When you come to determine the credibility of the witnesses, you see them on the witness-stand; you observe their demeanor, the manner in which they testify, the reasonableness or unreasonableness of the thing they tell you, the likelihood of the thing happening, the interest of the witnesses, the motive,

if they have any, that is apparent to you, and upon all considerations that in your judgment as men go to the credibility of other men, you determine where, and what witnesses are telling the truth, and how much weight you will give to their testimony. You determine that here as in your own business lines,—when you transact business you determine whether the man you are dealing with is telling the truth, and you do the same here, and that is entirely for you.

Now, this case seems to be about as follows: It is what is termed a case involving the last clear chance doctrine. It seems that early in the morning in November, about four o'clock, as I remember it, at a time of the year when it certainly was dark, save for such light as may have been given by the arclight, or reflected from the engine or lanterns, such as there were there, it seems the boy was driving along the road towards the railroad crossing, and he was in an enclosed milk-wagon with a load of milk in [98] cans and bottles. This milk-wagon had a glass front and sides. He was driving along when first seen at a slow trot, I think the witnesses fixed it at five, six or seven miles an hour, or something like that. Now, as the case stands, that boy driving as he did, up to and over that crossing, was himself negligent in the eyes of the law, because every man is supposed to recognize in a railroad crossing a signal of danger and look out for himself, and if these defendants coming up there, even if they had been negligent in approaching that crossing, if they had not seen the boy at all and run over him, the defendants would not be liable, because the

boy's negligence would counteract the defendants' negligence, and the case would hang in the balance, and the law would not allow one to recover for damages inflicted by the other. But by reason of the circumstances arises the last clear chance doctrine. That is, that if both parties were negligent, or the plaintiff's boy was negligent, yet, if the defendants see him in time to avoid doing him an injury by the exercise of ordinary care after they see him, and appreciate the danger that he is running into, and still, if they carelessly and negligently run him down, then they are liable, even though he was originally negligent. I think you can understand that by saying that supposing a man was sleeping on that crossing and a train came along and none of the men on the engine or train took any notice of him or saw him, and they killed him, the heirs of the dead [99] man could not recover, but if the railroad men see him sleeping on the track they have no right to run him down, if by reasonable care they could have avoided it, and if they fail to stop after they see him, and being still able, seeing him in time, by the exercise of ordinary care to avoid it.

Now, as this boy was coming along the crossing, this train was coming around the curve. Chappell tells you about 350 feet from the crossing he saw the boy. The road and railway were converging, the train coming from here and the boy from here; it seems there is a slight down grade there, and if you take the testimony of Chappell for it, the train was drifting, no steam on, running by its own momentum, down grade, about eight miles an hour. The

engineer, Woods, tells you, as he came around the curve he made a small service application to take the curve, seven pounds of air,—the average service application of air as used ordinarily for stops or slowing down on curves, called service application as contrasted with an emergency application, and he says that after he got within about 150 feet of the crossing or 200 feet from the crossing,—150 to 200 feet, he saw the team coming along at a trot, about five miles an hour, and after he went on a little further released the service application, and he saw the team was not going to stop,—he said he recognized the fact that the boy was coming into danger, apparently unobservant, when he, [100] Wood, with the engine, was about seventy-five feet from the crossing. At that time, according to the evidence of Chappell, and also of Wood I think, the train had been slowed down by this service application, to about six miles an hour. Now, it is evident from the rate at which this train and team were going, and the distances as given to you by Chappell,—Chappell says when the train was 230 feet from the crossing,—these are all estimates, gentlemen, and there is chance for leaway on either side, as it seems best to you to make it under all the circumstances,—Chappell says when the train was 330 feet from the crossing the boy was about 175 feet from the crossing, and when they came in contact there the train was traveling some faster in the first instance than the team was, but if the train was reduced to around six miles an hour when within seventy-five feet of the crossing, or thereabouts, as Wood says it was, when he first appreciated the boy's danger, it is probable that

the team and train were moving at about the same rate of speed. Now, here is the law with reference to that situation. The company and the defendants are liable for nothing until they saw and appreciated the boy's danger, and after that they were liable to exercise ordinary care to protect him. They had a right to assume up until that time that the team and the driver would stop when it came within such distance of the crossing, as the disposition of the team would permit safely to be done, and you can understand [101] the reason for that—that primarily the railroad had the right of way over that crossing. If a team and a railroad train are approaching the crossing at the same time and there is danger of collision, then the team is bound to stop and give the railroad the right of way because it can stop more readily than can a heavy train, or any train of cars, so an engineer, when he approaches a crossing and sees a team coming from a distance, is not bound to assume then and there that that team is going to negligently drive on a crossing. He has a right to assume that when he approaches within a reasonable distance it will stop. So, as when a man is crossing a street, and half a block away he sees an automobile coming, the auto is not obliged to stop then and there; he has a right to believe that the man will observe the auto and cross over or give the right of way or a chance to stop to avoid collision at the vital moment. So these defendants and the railroad are not chargeable with negligence, save when the engineer and Chappell, in so far as Chappell had charge of the engine, appreciated the fact that the boy was unobservant

and liable to get on the crossing. The engineer tells you he recognized that at about seventy-five feet; that is an estimate; you have a right to consider under all of the circumstances whether it is proper to give leaway one way or the other, whether it is more or less than seventy-five feet. There was some evidence that Chappell also recognized that the [102] boy was in danger. He does not tell us at just what point it was, as I remember it, where he finally concluded that the boy was in danger, and gave the signal to stop.

Mr. WHEELER.—He said seventy-five feet in his deposition, I think, your Honor.

The COURT.—I have no note or recollection of it, but at any rate his signals, if not seen by the engineer, would not aid the plaintiff any in this case, because, as I said before, it is only what a man sees under such circumstances, what you can hold him liable for, but Chappell says he could have turned the safety cock and put on the emergency, or turned some cock, angle-cock on the rear of the engine and applied the emergency brakes as well as the engineer, but he says he was relying on the engineer to perform his own duties, and he had a right to assume that the engineer got his signal; he is trying to free himself, because they ask damages from Woods and Chappell also, and he says that when he saw there was going to be a collision he jumped off the engine and made an endeavor to kick open the angle-cock.

Now, it would be for you to say, in view of the fact that he was only the conductor, whether he was negligent and did not exercise ordinary care in not

applying that angle-cock himself in sufficient time, or whether he was justified in waiting as he did do, and is not guilty of a lack of ordinary care because he failed to kick open the angle-cock,— [103] missed it at the last moment, when he leaped from the engine, so far as Chappell is concerned.

Woods tells you that when he recognized the boy was in danger, when he was about seventy-five feet from the crossing, that he did all he could; he drew in the air and applied the emergency, and he tells you, and others tell you the same thing, and there is no contradiction of that, that the emergency did not work as well at that time, because of the previous application of service air; all of the witnesses who testified on the point say the same thing. Britton, for the plaintiff, tells you that if there was a little service application first, it would probably affect the distance in which the train could be stopped by the subsequent application of the emergency air, or making an emergency stop. He does not tell us how far; he has left that indefinite; I think, however, that that is easily within your comprehension; of some of the air has been used, drawn out of the reservoirs, before you can get the full force of full reservoirs, naturally they must have been filled up again, so you have that in mind in arriving at the conclusion whether the engineer did all he could. Remember the railroad is not responsible because the air was taken down before the engineer appreciated that the boy was in danger; he had a right to make that application coming around the curve, and the defendants are not chargeable with

negligence until after it was appreciated by the employees [104] of the railroad company that the boy was in danger. Take the situation as it was, and not go back and try to say they were negligent in not having full reservoirs of air at the particular moment. Woods tells you he applied this air at seventy-five feet. You heard the testimony of the brakeman who stood on the rear of the train, which also was an estimate, that the emergency was not applied until about at the crossing. What he meant by "about" is not explained to us by him. You will have to judge of that by your common experience. Did he mean a short distance, a few feet,—is that what he meant or men would mean by "about," or could he mean as much as seventy-five feet. For myself I think the fair inference would be that it was applied practically at the crossing, but you are not bound by my opinion. You draw those inferences of fact for yourself. But there are other circumstances you must have in mind. Remember the testimony is that it was a clear and a frosty night,—frost on the railroad tracks. There is testimony by Chappell that several trains had gone over those rails that night. How long before this four o'clock accident, when the tragedy happened is not disclosed; whether the frost would renew itself before this particular train came along you must conclude, calling again upon your common experience. Some of the witnesses for the defendant tell you that while certainly the passage of trains over the rails would remove some of the frost, whether it was off [105] at that time would depend on

the time when those trains passed in relation to this particular train that did the injury. You understand that also. Some of the witnesses for the defense say that if trains had recently passed they would take the frost from the rails; the passage of the train would create heat; that would leave the rails moist and greasy, and that under those circumstances the emergency brake would not, or any brake would not work as well. It is all the same brakes,—emergency because they apply it at once. Then there is another circumstance you have a right to assume, even if there is no proof, that this engine was provided with sand, because that is the customary rule of railroads, that engines are provided with sand. The engineer tells you that he did not apply any sand there because it was on a curve and would not fall on the rails and so would do no good, and I think that is the only reason he gives for not applying sand. You have the testimony of other witnesses, also for the defense, that some of the sand probably would have gone upon the rails, and you have testimony on the part of the plaintiff, I think from Groff and Britton, that with that engine, sand at that particular place would have gone on the rails, because seventy-five feet from the crossing, for the last seventy-five feet to the crossing, the curve is very slight,—I think Groff said it was practically straight, and so the sand would have gone upon the rails, and so to that extent that you will be able [106] to determine would have counteracted the effect of the frost and the moisture, if any there was, upon the rails. The engineer applied no sand; he

gave you his reason. You will appreciate of course in determining this case that the time from the time the engineer says he appreciated the danger until the actual collision was very brief. If when he saw the boy and appreciated his danger, not when he first saw him, because until he appreciated the danger is the point from where the negligence is chargeable,—if, from the time he appreciated the danger, if seventy-five feet from the crossing, and if the train was going six miles an hour, it would take that train about,—a little more than eight seconds, eight and one-half seconds to reach the crossing, and it is for you to say whether under the circumstances that engineer exercised ordinary care to avoid injuring the boy. Remember that ordinary care means care suited to the occasion. You can understand that a degree of care with which one thing will be done would be absolute carelessness and negligence in doing some other thing that required more care. You can handle cordwood much more roughly than you can handle plate glass, and yet you might handle the cordwood with ordinary care, which would be great carelessness in handling plate glass. When it comes to avoiding collision to save a human life, ordinary care means the highest degree of care that a human can be capable of. He was bound to do everything an engineer at that time and [107] place could have done. He did not get excited; he has not told us so. He has full command of his faculties, and it is for you to say whether in applying the emergency, as he says he

did, if he did, whether that was ordinary care and relieve him of the charge of negligence. Of course, if he and Chappell were not negligent, the railroad company was not, because negligence of a railroad company is nothing more than the negligence of its employees, Chappell and Woods,—it can only be negligent through its employees. Did the engineer exercise ordinary care under the circumstances, to avoid a collision with that boy, or the wagon in which the boy was, after he, the engineer, appreciated that the boy was getting into danger, and that a collision was *eminent*? If the engineer acted with that degree of ordinary care, and if Chappell acted with the ordinary care that he ought to have used at that particular time, remembering that he was not the engineer, then your verdict should be for the defendant. If, on the other hand, under all the circumstances, you determine that the engineer did not act with ordinary care, then your verdict must be for the plaintiff.

And then, if you come to that point that you have determined that your verdict, in view of the law as given to you by the Court, and the facts as you find them, is for the plaintiff, then you are to determine what damages the plaintiff is entitled to, and that means what damages has he [108] suffered by reason of the death of the boy. The damages in this case are only those in a pecuniary or money sense; nothing is to be allowed for the loss of a child, for grief or damaged affections, or anything of that sort, or for loss of society or companionship of the child. A husband or wife who lose the other like that have

right to damages, but not for the loss of a child. The only damages due to a parent where a minor child is killed, are the loss of services, the loss of the money value that those services would have been to the father, whether services rendered direct to the father, or in the employ of somebody else. You know that a father has a right to call on a minor child for all his services, of a minor child, until twenty-one years of age, and that is the reason why, when that child is killed by the negligence of another, the father has a right to demand what he has lost. In arriving at what he has lost you always deduct the expense that the father would have been put to for clothing for the boy and educating him, until he would reach the age of twenty-one. It is the profit that the boy would have been to the father. If it comes to a case where you believe that the boy would be a greater expense to the father than a profit, then he would not be entitled to any damages, because he has not lost any money. That is the basis on which these cases are decided. The law is that after the evidence is all before you, and you have heard the rules of law, you are to allow such damages, [109] if you feel any have been imposed on the father, as under all the circumstances of the case seem to your honest judgment just, and that is the pecuniary damage in loss of service that the father has suffered, the profit that he would have made on it, over and above the expense that the boy would have been to him. In arriving at that you must call again upon your common experience. There is no evidence here of what the boy was earn-

ing a month; there is no evidence of what the boy was earning or the expense while living at home he would be to the father. You call upon your judgment as men to determine those facts for yourselves. You must have in mind that if the boy worked away from home he might not have worked steadily, or that there might have been times when he could be sick or out of employment and an expense to the father rather than an instrument of profit, and you have a right to bear in mind that the boy might die before he reached twenty-one years of age, and having all those matters in mind, you determine how much the services of the boy to the father would probably have been, and then when you determine that, how much the father would have received for about five years,—the boy was within a month of sixteen years old, then you determine the present value of that, whatever the father would get from the boy if he lived the five years, and you will all understand that if you are going to give a lump sum, you will have in mind what it would have taken the father five years [110] to get; a smaller lump sum total to-day would be the equivalent of what it would take five years to get. A member of your number is engaged in the insurance business and understands that. If you are entitled to one hundred dollars for five years, you would of course take less than that to-day, because you would have it all in hand and would not be required to wait to get the full sum.

I thing the evidence is pretty well before you in reference to this boy. There is testimony by some

witnesses that he was a good well-disposed boy inclined to work, when he was working for Glover, performed his duties, and was reliable and dependable. There is some evidence that the boy had been in the industrial school. I am not saying how you would look at that. For myself, I would not be inclined to say that would impeach his character. They put boys in the industrial school on slight provocation nowadays. It is for the parents to discipline boys. I don't think the father in this case was justified in putting that boy in the industrial school, simply because he rustled junk. He does not say that the boy rustled junk dishonestly; that is not in itself an offense. Anybody has a right to property others have abandoned, and I would not say that that reflected anything on the boy. He had a right to reform anyhow. And when you take into consideration that this boy found for himself a job in the country and got up at four o'clock in the morning and drove a wagon and was a [111] good dependable boy, I think there was some evidence of stability about him even at that age, but in coming to a conclusion you are not to be moved by sympathy. We have not a right to be tender hearted, and if we do not believe there is a legal right in the plaintiff we cannot be moved by sympathy. You have a right to be sympathetic out of your own pocket, but not out of anothers, or to take money out of another man's pocket out of sympathy, either in a courtroom or out of a courtroom. It is a straight legal proposition. You are public officers; you are officers of this Court, sworn to render a true and just ver-

dict, in accordance with the law and the evidence, not in accordance with either prejudice or sympathy.

I don't know of anything else I need to instruct you upon. Remember it is for you to determine the facts under the rules of law that the Court has given. When you retire to the jury-room you will select a member of the jury foreman, and twelve must agree on any verdict.

Are there any objections or exceptions?

Mr. WHEELER.—The plaintiff is satisfied.

Mr. FURMAN.—The defendant is satisfied.

[112] Service of the above and foregoing bill of exceptions accepted, and copy thereof received, this 13th day of June, A. D. 1916.

B. K. WHEELER,
Attorneys for Plaintiff.

I hereby certify that the above and foregoing bill of exceptions is a true and correct bill of exceptions and order that the same be signed, settled, allowed and filed this 19 day of Oct., 1916.

BOURQUIN,
Judge.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Received at Clerk's Office June 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. Filed Oct. 19, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. Shelton & Furman, A. J. Verheyen, Attys. for Defts.

[113] And thereafter, to wit, on the 20th day of November, 1916, Remission of Judgment was filed herein, which is entered of record as follows, to wit:

In the District Court of the United States, District of Montana.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation,

Defendant.

Remission of Judgment.

I, the undersigned, plaintiff in the above-entitled action hereby accept the sum of One thousand five hundred (\$1500) dollars, as the judgment in the above-entitled action, and agree to the reduction of the said judgment from two thousand five hundred (\$2,500) dollars, to one thousand five hundred (\$1500) dollars, as directed in the order of the Honorable George M. Bourquin, presiding Judge, given and made and rendered on the 13th day of November, 1916.

DAVID CLEMENT.

We, the undersigned, attorneys for the above-named plaintiff hereby agree to the reduction in the above-entitled action to the sum of one thousand five hundred (\$1500) dollars.

B. K. WHEELER,
Attorney for Plaintiff.

Service of the above remission of judgment is hereby acknowledged and copy thereof received this 20th day of November, 1916.

SHELTON & FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants.

[114] [Endorsed]: Title of Court and Cause. Remission of Judgment. Filed Nov. 20, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy Clerk. B. K. Wheeler, Attorney for Plaintiff.

[115] And thereafter, to wit, on the 13th day of December, 1916, Assignment of Errors was filed herein, which is entered of record as follows, to wit:
*In the District Court of the United States for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpo-
ration, J. E. WOODS and M. I. CHAPPELL,
Defendants.

Assignment of Errors.

Plaintiffs in error, defendants above named, in connection with their petition for writ of error here-

in, specify the following particulars wherein error was committed in said cause:

I.

ERRORS OF LAW.

1. The Court erred in overruling defendants' separate demurrer, for the reason that

a. The complaint fails to allege discovery by the defendants, or any of them, of David Clement, Jr., in a place of peril.

b. It is evident from the complaint that David Clement, Jr., drove upon the defendant corporations' railroad track into a place of danger, without looking or listening.

2. The Court erred in denying defendants' motion [116] for a directed verdict, made on their behalf at the conclusion of the taking of testimony, for the reason that

I.

a. There has been a total failure of proof on the part of the plaintiff to establish any act of negligence or to establish any omission of ordinary care on the part of the defendants.

II.

b. The plaintiff has totally failed to prove the discovery of David Clement, Jr., in a place of peril.

III.

c. Plaintiff has totally failed to prove that after David Clement, Jr., came into a place of peril there was any failure on the part of the defendants, or any of them to exercise ordinary care.

IV.

d. It appeared affirmatively from the evidence that after David Clement, Jr., came into a place of

peril and of danger no interval elapsed during which time it was possible for defendants, or any of them, in the exercise of ordinary, or any other degree of care, to avoid injuring and killing David Clement, Jr.

V.

e. It appeared affirmatively from all of the evidence that the negligence of David Clement, Jr., concurred with the negligence of the defendants up to and producing the injury, and no recovery can be had in this case for under such circumstances there is no room for the application of the doctrine of the last clear chance.

3. The Court erred in entering judgment upon the verdict for the plaintiff, for the reason that:

[117] a. The evidence is not sufficient to support a verdict for the reason that

1. Under the pleadings the plaintiff relies on the doctrine of the last clear chance, and fails to prove discovery.

2. The evidence conclusively shows concurrent negligence on the part of David Clement, Jr.

3. The evidence shows that the verdict is excessive and that excessive damages appear to have been given under the influence of passion and prejudice.

II.

ERRORS RELATING TO THE ADMISSION AND REJECTING OF TESTIMONY.

1. The Court erred in overruling defendants objection to the question asked of plaintiff's witness, David Clement, on direct examination, in the following respect:

“Q. Mr. Clement, what have you to say with reference to the boy, as to whether or not he was industrious, and so forth?

“Mr. FURMAN.—We object to that, on the ground it is unduly leading and suggestive; it doesn’t appear necessary to lead or suggest to the witness the line of testimony desired.

“The COURT.—Well, it only points attention to what counsel means by disposition. Overruled. Isn’t it admitted by the answer? Well, anyway. Proceed. The objection is overruled.

“Mr. FURMAN.—Exception.

(2) “Q. What was the boy’s—was anything said by the boy to you with reference to his going back to school?

“Mr. FURMAN.—Just a minute. We object to that on the ground that is hearsay, it is irrelevant.

“The COURT.—Oh, it would have a tendency to show the possible or probable amount that the boy would have contributed to the father; I am not clear whether it makes for the benefit of the plaintiff or the defendant; he may answer; the objection is overruled.

[118] 2. The Court erred in sustaining plaintiff’s objection to the question asked of the witness James B. Glover, on cross-examination, in the following respect:

(3) “Q. Was that the first information that you had respecting him?

“Mr. WHEELER.—We object to it as being irrelevant and immaterial, and incompetent, not

tending to prove or disprove any issue. He says he first met him at the ranch.

“The COURT.—I think so. Objection sustained.

“Mr. FURMAN.—Exception.

3. The Court erred in sustaining plaintiff’s objection to the offer of proof to be made by plaintiff’s witness, James B. Glover, on cross-examination, in the following respect:

“(Whereupon the following offer in writing was submitted.)

(4) Defendant offers to prove by plaintiff’s witness Glover, now on the stand, that he first heard of David Clement, Junior, when the said Clement was sleeping in a barn belonging to witnesses’ brother-in-law, Al Congdon. That the said time was shortly prior to the time Clement, Jr., started working for witness.”

“Mr. WHEELER.—We object to the offer on the ground it is incompetent, irrelevant and immaterial, improper cross-examination, not proving or tending to prove any issue in the case.

“The COURT.—Objection sustained.

“Mr. FURMAN.—Exception.

4. The Court erred in sustaining plaintiff’s objection to the question asked of defendants’ witness W. G. Ward, on direct examination, in the following respect:

[119] (5) “The WITNESS.—My name is W. G. Ward. I knew David Clement, Jr., in his lifetime; I chummed with him. During the time he was at the Industrial School I went out to

see him. I think the first or second Sunday after he was out there.

“Q. Now, what if anything, did he say to you with respect to leaving his father’s home?

“Mr. WHEELER.—Just a moment. We object to that as being irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

“The COURT.—Sustained.

“Mr. FURMAN.—Exception.

5. The Court erred in sustaining plaintiff’s objection to the offer of proof made by the defendant, in the following respect:

(6) “Mr. FURMAN.—May it please your Honor, we want to make an offer of proof. (Thereupon the following offer of proof, in writing, was submitted by counsel for the defendant:

Defendants offer to prove by defendants’ witness W. G. Ward, now on the stand, that David Clements, Jr., told him at the Industrial School, on the first or second Sunday after Clements, Jr., was committed there that his father, David Clements, had kicked him out of the house and would not permit him to live at home any longer.”

“Mr. WHEELER.—We object to it, on the ground and for the reason it is irrelevant, immaterial and incompetent, hearsay, not tending to prove or disprove any issue in the case.

“The COURT.—Objection sustained.

“Mr. FURMAN.—Exception.

[120] The Court erred in sustaining plain-

tiff's objection to the offer of proof made by defendants of the commitment of David Clement, Jr., to the Industrial School, in the following respect:

“Mr. FURMAN.—Now, we have an instrument we are going to offer in evidence. (The said instrument so offered in evidence is in words and figures as follows, to wit:

“In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

In the Matter of DAVE CLEMMENTS, Alleged
Juvenile Disorderly Person.

COMMITMENT.

Be it remembered that on the 3d day of May, 1912, a complaint was filed in the office of Justice of the Peace, Charles Foley, charging the above-named Dave Clemments, with being Juvenile Disorderly Person, and the same having been duly certified to and heard this day by this Court in the presence of said defendants, it is

ORDERED, ADJUDGED AND DECREED,
That the said Dave Clemments, *are* Juvenile Disorderly Person.

II. That said Dave Clemments, be, and *they are* hereby committed to the Industrial School, established in School District No. 1 in the City of Butte, Montana, until discharged according to law.

Done in open court this 3d day of May, 1912.

[Court Seal]

MICHAEL DONLAN,
Judge.

“Mr. WHEELER.—We object to it on the ground and for the reason it is irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

[121] “The COURT.—Objection sustained. The matter was heretofore testified to orally.

“Mr. FURMAN.—Exception. The defense rests.

WHEREFORE, defendants above named, pray that the petition for writ of error be granted; and that, for the reasons aforesaid, and for divers and sundry other reasons, the judgment entered herein on the 22d day of May, 1916, in the sum of twenty-five hundred (\$2500) dollars, and which said judgment was reduced, by order of the Court, to fifteen hundred (\$1500) dollars, on the — day of Nov., A. D. 1916, and accepted by plaintiff on the 20th day of Nov., A. D. 1916; which said judgment was suspended by the filing of defendants' petition for new trial on the — day of —, A. D. 1916, and re-entered by the order denying a new trial made and entered on the — day of —, A. D. 1916.

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,

Attorneys for Defendants, Plaintiffs in Error.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. Shelton & Furman, A. J. Verheyen, Attys. for Defts., Plffs. in Error.

[122] And thereafter, to wit, one the 13th day of December, 1916, Petition for Writ of Error was filed herein, which is entered of record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation;
CHICAGO, MILWAUKEE AND PUGET
SOUND RAILWAY COMPANY, a Corpo-
ration, J. E. WOODS and M. I. CHAPPELL,
Defendants.

Petition for Writ of Error.

Now comes Chicago, Milwaukee & St. Paul Railway Company, a corporation, Chicago, Milwaukee & Puget Sound Railway Company, a corporation, J. E. Woods, and M. I. Chappell, defendants herein and say;

That on or about the 22d day of May, A. D. 1916, this Court entered judgment herein in favor of the plaintiff and against these defendants, and which said judgment was reduced by order of the Court to \$1500 on the 13th day of Nov., 1916, and accepted by plaintiff on the 20th day of Nov., 1916, in which said judgment and the proceedings had prior thereunto in this said cause, certain manifest errors have in-

tervened and were committed, to the grave prejudice of these said defendants—all of which will, in more detail appear from the Assignment of Errors filed with this petition.

WHEREFORE, defendants, feeling themselves aggrieved by the said judgment, come now and pray the Court for an order allowing the said defendants to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided for the [123] correction of the errors so complained of; that an order be made fixing the amount of supersedeas bond in this said case; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

And the said defendants herewith submit their assignment of errors in accordance with the rules of the United States Circuit Court of Appeals and the course and practice of this Honorable Court.

And your petitioners will ever pray.

GEORGE F. SHELTON,
FRED J. FURMAN.
A. J. VERHEYEN.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy. Shelton & Furman, A. J. Verheyen, Attys. for Defts., Plffs. in Error.

[124] And thereafter, to wit, on the 13th day of December, 1916, an Order Allowing Writ of Error, was entered herein, which is entered of Record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a Corporation;
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a Corpo-
ration, J. E. WOODS and M. I. CHAPPELL,
Defendants.

Order Allowing Writ of Error.

On this 13th day of December, A. D. 1916, came the defendants herein, by their attorneys, and filed herein and presented to the Court their petition praying for the allowance of a writ of error, together with an assignment of errors intended to be urged by them; praying also that an order be made fixing a supersedeas bond; and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the said defendants' giving bond according to law in the sum of three thousand dollars (\$3000).

BOURGUIN,

Judge of the District Court of the United States, for the District of Montana.

[125] [Endorsed]: No. 123. District Court of the United States, for the District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, et al., Defendants. Order Allowing Writ of Error. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[126] And thereafter, to wit, on the 13th day of December, 1916, Bond on Writ of Error was filed herein, which is entered of record as follows, to wit:

In the District Court of the United States, for the District of Montana.

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation; CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, a Corporation; J. E. WOODS and M. I. CHAPPELL,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, J. K. Heslet and Alex. J. Johnston, as sureties, are held and firmly bound unto plaintiff, David Clement, in the full and just sum of three hundred (\$300) dollars, to be paid to the said David Clement, his executors, administrators, or assigns, to which payment, well and truly to be made, we do hereby bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 13th day of December, A. D. 1916.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement, plaintiff, and the said Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods and M. I. Chappell, defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's [127] office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the — day of — next;

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants

shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

J. K. HESLET.

ALEX J. JOHNSTON.

United States of America,
State and District of Montana,
County of Silver Bow,—ss.

J. K. Heslet and Alex J. Johnston, being severally duly sworn, on oath, each for himself says: that he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the city of Butte, county of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all the just debts and liabilities, exclusive of property exempt from execution.

J. K. HESLET.

ALEX. J. JOHNSTON.

[128] Subscribed and sworn to before me this 13th day of December, A. D. 1916.

[Seal] A. J. VERHEYEN,
Notary Public for the State of Montana, Residing at
Butte, Montana.

My commission expires Jan. 23d, 1918.

Approved by:

BOURQUIN,

United States District Judge for the District of
Montana.

[Endorsed]: Title of Court and Cause. Bond on
Writ of Error. Filed Dec. 13, 1916. Geo. W.

Sproule, Clerk. By Harry H. Walker, Deputy.
Shelton & Furman, A. J. Verheyen, Attys. for Defts.
Plffs. in Error.

[129] And thereafter, to wit, on the 13th day of December, 1916, Supersedeas Bond on Writ of Error was filed herein, which is entered of record as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

No. 123.

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS and M. I. CHAPPELL,

Defendants.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, as principals, and J. K. Heslet and Alex J. Johnston, as sureties, are held and firmly bound unto David Clement, plaintiff above named, in the full and just sum of three thousand (\$3000) dollars, to be paid to the said David Clement, plaintiff, as aforesaid, his certain attor-

neys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals, and dated this 13th day of December, A. D. 1916.

WHEREAS, lately, at a District Court of the United States, for the District of Montana, in a suit pending in the said court, between the said David Clement, plaintiff, and the said Chicago, Milwaukee & St. Paul Railway Company [130] (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants, a judgment was rendered against the said defendants; and the said defendants, having thereafter obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said David Clement, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the ——— day of ——— next;

NOW, THEREFORE, the condition of the foregoing obligation is such that if the said defendants shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void;

otherwise to remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY.

CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY.

J. E. WOODS,

M. I. CHAPPELL.

By A. J. VERHEYEN,

Their Attorney.

[131] J. K. HESLET.

ALEX J. JOHNSTON.

United States of America,
State and District of Montana,
County of Silver Bow,—ss.

J. K. Heslet and Alex J. Johnston, being severally duly sworn, on oath, each for himself says: that he is one of the sureties who subscribed the above and foregoing bond; that he is a resident and householder within the City of Butte, County of Silver Bow, State of Montana, and is worth the sum mentioned in the said undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ALEX J. JOHNSTON.

J. K. HESLET.

Subscribed and sworn to before me this 13th day of December, 1916.

[Seal]

A. J. VERHEYEN,

Notary Public for the State of Montana, Residing at
Butte, Montana.

My commission expires Jan. 23, 1918.

Approved by:

BOURQUIN,

United States District Judge for the District of
Montana.

[Endorsed]: Title of Court and Cause. Super-
sedeas Bond on Writ of Error. Filed Dec. 13, 1916.
Geo. W. Sproule, Clerk. By Harry H. Walker,
Deputy. Shelton & Furman, A. J. Verheyen, Attys.
for Defts. Plffs. in Error.

[132] And thereafter, to wit, on the 13th day of
December, 1916, a Writ of Error was duly issued
herein, and thereafter on the 13th day of December,
1916, filed herein, which is as follows, to wit:

[133] *In the United States Circuit Court of
Appeals, in and for the Ninth Circuit.*

Writ of Error.

United States of America,
District of Montana,—ss.

The President of the United States, to the Honor-
able, the District Court of the United States for
the District of Montana, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is in
said District Court before you, between David Cle-
ment, plaintiff, and Chicago, Milwaukee & St. Paul
Railway Company (a corporation), Chicago, Mil-
waukee & Puget Sound Railway Company (a cor-
poration), J. E. Woods, and M. I. Chappell, defend-
ants, a manifest error hath happened, to the great

damage of the said defendants, as by their petition and assignment of errors appears, we, being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in said Circuit, on [134] the 13th day of January next, within thirty (30) days hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD DOUGLASS WHITE, Chief Justice of the United States, and the seal of the said District Court of the United States for the District of Montana, this 13th day of December, A. D. 1916, and in the one hundred and forty-first year of the Independence of the United States of America.

[Seal]

GEO. W. SPROULE,
Clerk of the District Court of the United States, for
the District of Montana.

By Harry H. Walker,
Deputy.

Allowed by:

BOURQUIN,

United States District Judge, for the District of
Montana.

Service of the above and foregoing Writ of Error
is hereby admitted, and receipt of copy thereof ac-
knowledged, this 13th day of December, A. D. 1916.

WHEELER & GRORUD,

Attorneys for Plaintiff in Said District Court of the
United States for the District of Montana, De-
fendant in Error.

[135] Answer of Court to Writ of Error.

The Answer of the Honorable, the District Judge
of the United States for the District of Montana,
to the foregoing Writ:

The record and proceedings whereof mention is
within made, with all things touching the same, I
certify, under the seal of the said District Court of
the United States, to the United States Circuit Court
of Appeals for the Ninth Circuit, within mentioned,
at the day and place within contained, in a certain
schedule to this writ annexed, as within I am com-
manded.

By the Court,

[Seal]

GEO. W. SPROULE,

Clerk.

By Harry H. Walker,

Deputy.

[136] [Endorsed]: No. 123. District Court of
the United States, for the District of Montana,
David Clement, Plaintiff, vs. Chicago, Milwaukee &

St. Paul Railway Company, a Corporation, et al.,
Defendants. Writ of Error. Filed Dec. 13, 1916.
Geo. W. Sproule, Clerk. By Harry H. Walker,
Deputy.

[137] And thereafter, to wit, on the 13th day of December, 1916, a Citation was duly issued herein, and thereafter on the 13th day of December, 1916, filed herein being as follows to wit:

[138] *In the United States Circuit Court of Appeals, in and for the Ninth Circuit.*

Citation of Writ of Error.

United States of America,

District of Montana,—ss.

The President of the United States to David Clement, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, on the 12 day of Jan., 1917, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Chicago, Milwaukee & St. Paul Railway Company (a corporation), Chicago, Milwaukee & Puget Sound Railway Company (a corporation), J. E. Woods, and M. I. Chappell, defendants in said District Court, are plaintiffs in error, and you, the said David Clement, plaintiff in said District Court, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in

error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

[139] WITNESS the Hon. GEORGE M. BOURQUIN, United States District Judge for the District of Montana, this 13th day of December, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk United States District Court for the District
of Montana.

By Harry H. Walker,
Deputy.

Due personal service of the foregoing Citation made and admitted, and receipt of copy acknowledged, this 13th day of December, A. D. 1916.

WHEELER & GRORUD,
Attorneys for Plaintiff in Said District Court and
Defendant in Error.

[140] [Endorsed]: No. 123. District Court of the United States, for the District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, et al., Defendants. Citation of Writ of Error. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[141] On December 13, 1916, Praeceptum for Record on Appeal was filed herein, being as follows, to wit:

*In the District Court of the United States, for the
District of Montana.*

DAVID CLEMENT,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a Corporation; CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY, a Corporation; J.
E. WOODS, and M. I. CHAPPELL,

Defendants.

Praeceptum.

The clerk of the said court will please insert the following in the transcript on appeal:

Amended Complaint, Separate Demurrers of the Railway Companies, Chappell and Woods to Amended Complaint, Answer to Amended Complaint, Verdict, Judgment, Petition for New Trial, Bill of Exceptions, Opinion, Remission of Judgment and Order of Court Denying New Trial, Petition for Writ of Error, Order Allowing Writ of Error, Writ of Error, Assignment of Errors, Citation on Writ of Error, Supersedeas Bond on Writ of Error, Bond on Writ of Error, and Praeceptum.

GEORGE F. SHELTON,

FRED J. FURMAN,

A. J. VERHEYEN,

Attorneys for Defendants, Plaintiffs in Error.

[142] Service of the above and foregoing Praecipe is hereby acknowledged and copy thereof received, this —— day of December, 1916.

Attorney for Plaintiff.

[143] [Endorsed]: No. 123. In the District Court of the United States for the District of Montana. David Clement, Plaintiff, vs. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, J. E. Woods and M. I. Chappell, Defendants. Praecipe. Filed Dec. 13, 1916. Geo. W. Sproule, Clerk. By Harry H. Walker, Deputy.

[144] **Clerk's Certificate to Transcript of Record.**
United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 144 pages, numbered consecutively from 1 to 144, inclusive, is a true and correct transcript of the pleadings, orders, judgment, opinion of the Court, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify

and return that I have annexed to said transcript and included within said pages the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of fifty and 20/100 dollars, and have been paid by the appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 23d day of December, 1916.

[Seal] GEO. W. SPROULE,
Clerk United States District Court, District of Mon-
tana.

[Endorsed]: No. 2900. United States Circuit Court of Appeals for the Ninth Circuit. Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Chicago, Milwaukee & Puget Sound Railway Company, a Corporation, J. E. Woods and M. J. Chappell, Plaintiffs in Error, vs. David Clement, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed December 26, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a cor-
poration, J. E. WOODS and M. J.
CHAPPELL,

Plaintiffs in Error.

vs.

DAVID CLEMENT,

Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court of
the District of Montana

GEORGE F. SHELTON,
FRED J. FURMAN,
A. J. VERHEYEN,
Counsel for Plaintiffs in Error.

Filed.....

Filed
Clerk.



BUTTE MINER COMPANY, PRINTERS.

FEB 19 1917

F. D. Monckton
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY, a corporation,
CHICAGO, MILWAUKEE & PUGET
SOUND RAILWAY COMPANY, a cor-
poration, J. E. WOODS and M. J.
CHAPPELL,

Plaintiffs in Error.

vs.

DAVID CLEMENT,

Defendant in Error.

Brief of Plaintiffs in Error

STATEMENT OF THE CASE.

A.—THE PLEADINGS.

David Clement, Jr., was killed while driving an enclosed milk wagon northward on Montana street in the City of Butte, Montana, in a collision with a Chicago, Milwaukee & Puget Sound Railway Company train. David Clement brought suit against the plaintiffs in error, defendants

below, to recover the profits which he alleged he lost by reason of his son's death.

The suit was brought under the doctrine of the last clear chance. The Court so instructed the jury. (Tr., page 99, line 10.)

The specific allegation of negligence is (Tr., page 4).

“ * * * the said David Clement, Jr., was driving a pair of horses and riding in an enclosed milk wagon * * * and was not observant of the approach of a train * * * that the said David Clement, Jr., was COMING DIRECTLY WITHIN THE WAY of the said approaching train; that the said engineer and the said Chappell did see the said David Clement, Jr., COMING DIRECTLY IN THE PATH of the said engine * * * ”

Plaintiffs in Error deny all the material allegations of the complaint of defendant in error, except the allegations as to corporate existence, the collision resulting in the death of Clement, Jr., and the employment of the individual plaintiffs in error.

B.—THE EVIDENCE.

On many points the evidence is in accord. It is agreed that on the morning of the fatality Engineer Woods was moving a train of twelve loaded cars (Tr., p. 37, lines 6 and 7) weighing approximately 750 tons, to the B., A. & P. Ry. transfer. His engine was a standard switch engine with a coal oil lamp at each end (Tr., p. 39). Chappell, switch foreman, was standing on the foot board on the south side of the engine at the extreme west end; that some four or five hundred feet east of the crossing where

the accident happened the train came around a curve at a speed of about eight miles per hour. Shortly thereafter some breaking power was applied and the speed of the train perceptibly checked. At the time the train was approximately three hundred feet each from the crossing (Tr., p. 32) the milk wagon was one hundred seventy-five feet or thereabouts south of the crossing (Tr., p. 44). The wagon was approaching the crossing at the rate of four or five miles per hour (Tr., p. 32). From the time the wagon first came into sight no effort was made on the part of the driver to stop or check the team (Tr., p. 32). The team showed no evidence of fright (Tr., p. 70), but approached steadily at the same gate. There was no indication of any driver on the wagon (Tr., pages 43, 44, 58 and 68). All this according to the testimony of Chappell.

It is corroborated by the testimony of Woods who saw the rig one hundred seventy-five feet south of the crossing (Tr., p. 68) going at the rate of about five miles on hour and showing no symptom of nervousness (Tr., p. 70). He saw the boy at no time before the accident (Tr., p. 68).

Of these matters, there is no contradiction.

At a point about seventy-five feet from the crossing (Tr., p. 69) Engineer Woods applied the emergency break. The rails were then frosty (Tr., p. 67). Because of the service application which had been made coming around the curve a brief space prior the emergency did not work as well. The Court so instructed the jury, saying:

“ * * * he tells you, and others tell you the same thing, and there is no contradiction of that, that the emergency did not work as well at that time, because

of the previous application of service air; all of the witnesses who testified on the point say the same thing. * * * "

(Tr., p. 104, lines 10-15.)

The testimony is uncontradicted that the team approached at a uniform rate of speed to the very point of the accident, and that the train, too, was still moving at the time of the collision. There was no diminution on the part of the milk wagon, and the speed of the train was not sufficiently diminished to enable the crew to bring the train to a stop until it had gone a considerable distance past the crossing.

The first time that Clement, Jr., was seen at all was by Chappell after the train had stopped (Tr., p. 41). He had seen no man up to that time (Tr., p. 43).

Woods first saw the boy when he got off the engine and went back to meet Chappell (Tr., p. 68). That was the first time he saw anybody (Tr., page 68).

David Clement testified that his son was one month under sixteen years of age (Tr., p. 28). That altogether during his lifetime his son had turned over to him the sum of \$15.00 (Tr., p. 26, 28).

C.—VERDICT AND APPEAL.

At the conclusion of the taking of testimony plaintiffs in error sought a directed verdict upon other grounds also; but chiefly upon the grounds that the doctrine of the last clear chance did not apply to the case, but that the evidence made it conclusive that the negligence of the defendant in error and the negligence of the plaintiffs in error ad-

mitted by the pleadings and clearly established by the evidence were concurrent and active to the very instant of accident and to the very point of accident. The trial court said in denying the motion, that there was one question only, and that was, did the engineer do all he could to prevent the collision after he appreciated the danger (Tr., p. 94). It is the view of the trial court that there is no such doctrine as the doctrine of concurrent negligence. After argument and the instruction of the court, the jury returned a verdict in favor of the defendant in error for the sum of \$2,500.00. Upon motion for a new trial the trial court made an order granting a new trial unless defendant in error remitted in writing \$1,000.00 from the verdict (Tr., p. 23). This was done by the defendant in error (Tr., p. 113). Plaintiffs in error still feeling that the verdict was not justified by the evidence and feeling that the evidence clearly showed that the doctrine of the last clear chance did not avail the defendant in error, and that defendant in error's decedent was guilty of concurrent negligence which precluded defendant in error from recovering at all against the plaintiffs in error, filed their Bill of Exceptions, Assignment of Errors, and Petition for Writ of Error; and the order allowing the said Writ of Error to issue having been duly given and made (Tr., p. 124) thereafter in due time, and in the manner prescribed by law, and the rules of this Honorable Court, they have perfected their appeal to your Honors, and the writ of error brings the judgment of the United States District Court for the District of Montana in favor of the defendant in error, plaintiff below, and against the plaintiffs in

error, defendants below, before your Honors for review.

SPECIFICATIONS OF ERRORS.

1. The Court erred in overruling separate demurrers of defendants below (Tr., pages 8-11).

2. The Court erred in denying defendants' motion for directed verdict made on their behalf at the conclusion of the taking of testimony. (Tr., p. 89).

3. The Court erred in entering judgment upon the verdict for the plaintiff. (Tr., p. 17).

4. The Court erred in overruling the objection made by defendants to the question asked of plaintiff's witness, David Clement, on direct examination, in the following respect:

"Q. Mr. Clement, what have you to say with reference to the boy, as to whether or not he was industrious, and so forth?

"MR. FURMAN.—We object to that, on the ground it is unduly leading and suggestive; it doesn't appear necessary to lead or suggest to the witness the line of testimony desired.

"THE COURT.—Well, it only points attention to what counsel means by disposition? Overruled, Isn't it admitted by the answer? Well, anyway. Proceed. The objection is overruled.

"MR. FURMAN.—Exception.

(2) "Q. What was the boy's—was anything said by the boy to you with reference to his going back to school?

"MR. FURMAN.—Just a minute. We object to that on the ground that is hearsay, it is irrelevant.

"The COURT.—Oh, it would have a tendency to show the possible or probable amount that the boy would have contributed to the father; I am not clear

whether it makes for the benefit of the plaintiff or the defendant; he may answer; the objection is overruled.

(Tr., p. 117).

5. The Court erred in sustaining plaintiff's objection to the question asked of the witness, James B. Glover, on cross examination, in the following respect:

"Q. Was that the first information that you had respecting him?

"MR. WHEELER.—We object to it as being irrelevant and immaterial, and incompetent, not tending to prove or disprove any issue. He says he first met him at the ranch.

"THE COURT.—I think so. Objection sustained.

"MR. FURMAN.—Exception.

(Tr., p. 117, 118.)

6. The Court erred in sustaining plaintiff's objection to the offer of proof to be made by plaintiff's witness, James B. Glover, on cross-examination, in the following respect:

"(Whereupon the following offer in writing was submitted.)

Defendant offers to prove by plaintiff's witness Glover, now on the stand, that he first heard of David Clement, Junior, when the said Clement was sleeping in a barn belonging to witnesses' brother-in-law, Al Congdon. That the said time was shortly prior to the time Clement, Jr., started working for witness."

"MR. WHEELER.—We object to the offer on the ground it is incompetent, irrelevant and immaterial, improper cross-examination, not proving or tending to prove any issue in the case.

"THE COURT.—Objection sustained.

“MR. FURMAN.—Exception.

(Tr., p. 118.)

7. The Court erred in sustaining plaintiff's objection to the question asked of defendants' witness W. G. Ward, on direct examination, in the following respect:

“THE WITNESS.—My name is W. G. Ward. I knew David Clement, Jr., in his lifetime; I chummed with him. During the time he was at the Industrial School I went out to see him. I think the first or second Sunday after he was out there.

“Q. Now, what if anything, did he say to you with respect to leaving his father's home?

“MR. WHEELER.—Just a moment. We object to that as being irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

“THE COURT.—Sustained.

“Mr. FURMAN.—Exception.

(Tr., p. 118-119.)

8. The Court erred in sustaining plaintiff's objection to the offer of proof made by the defendant, in the following respect:

“MR. FURMAN.—May it please your Honor, we want to make an offer of proof. (Thereupon the following offer of proof, in writing, was submitted by counsel for the defendant:

Defendants offer to prove by defendants' witness W. G. Ward, now on the stand, that David Clements, Jr., told him at the Industrial School, on the first or second Sunday after Clements, Jr., was committed there that his father, David Clements, had kicked him out of the house and would not permit him to live at home any longer.”

“MR. WHEELER.—We object to it, on the ground and for the reason it is irrelevant, immaterial and incompetent, hearsay, not tending to prove or disprove any issue in the case.

“THE COURT.—Objection sustained.

“MR. FURMAN.—Exception.

(Tr., p. 119.)

9. The Court erred in sustaining plaintiff's objection to the offer of proof made by defendants of the commitment of David Clement, Jr., to the Industrial School, in the following respect:

“MR. FURMAN.—Now, we have an instrument we are going to offer in evidence. (The said instrument so offered in evidence is in words and figures as follows, to-wit:

“In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

In the Matter of DAVE CLEMENTS, Alleged Juvenile Disorderly Person.

COMMITMENT.

Be it remembered that on the 3d day of May, 1912, a complaint was filed in the office of Justice of the Peace, Charles Foley, charging the above-named Dave Clements, with being Juvenile Disorderly Person, and the same having been duly certified to and heard this day by this Court in the presence of said defendants, it is

ORDERED, ADJUDGED AND DECREED, That the said Dave Clements *are* Juvenile Disorderly Person.

II. That said Dave Clemments, be, and *they are* hereby committed to the Industrial School, established in School District No. 1 in the City of Butte, Montana, until discharged according to law.

Done in open court this 3rd day of May, 1912.

(Court Seal)

MICHAEL DONLAN,

Judge.

“MR. WHEELER.—We object to it on the ground and for the reason it is irrelevant, immaterial and incompetent, not tending to prove or disprove any issue in the case.

“THE COURT.—Objection sustained. The matter was heretofore testified to orally.

“MR. FURMAN.—Exception. The defense rests.

(Tr., pages 119-121.)

ARGUMENT NO. 1.

THE COURT COMMITTED PREJUDICIAL ERROR IN RULING UPON THE ADMISSIBILITY OF EVIDENCE.

Defendant in error sought to prove that had David Clement, Jr., lived the profits which his father would have made from the time of his death until the boy became of legal age would have been large. To show that the boy's life would have been profitable rather than a liability, defendant in error was asked what the boy's disposition concerning going to school was. Counsel asked the defendant in error what the *boy had said* to him with reference to going back to school. There was objection by counsel for

plaintiffs in error. The Court could not anticipate, so he said, whether the answer would be beneficial to the defendant in error or the plaintiffs in error. Plaintiffs in error had no difficulty anticipating what the answer would be. Had the boy been inclined to go to school he would have been a drain upon his father rather than an asset, and even though the Court may have been surprised to hear that the boy said he did not want to go to school but wanted to work, the answer was no surprise to the plaintiffs in error. The admission of this testimony was clearly prejudicial to plaintiffs in error's rights. On the other hand, when the plaintiffs in error sought to prove by the witness, Ward, that David Clement, Jr., had told him while at the Industrial School that his father had kicked him (David Clement, Jr.), out of the house, the Court rejected the testimony. Plaintiffs in error respectfully urge upon your Honors that the defendant in error is here impaled upon one of the two horns of a dilemma. If the evidence adduced by the benefit of the boy's statement to Clement, Sr., respecting going to school was material and proper, certainly the evidence of Ward to the effect that Clement, Sr., had kicked Clement, Jr., out of the house was material to the plaintiffs in error's case. It would enable the jury to form a conclusion as to the amount of money which Clement, Jr., would be apt to turn over to the father who had presumably treated him harshly if not unjustly. On the other hand, if this testimony which would be unfavorable to the defendant in error was not admissible, then certainly the testimony by Clement of the boy's statement was not admissible. Both statements fall in the same

class, and if one is admissible surely the other should be, and if one is inadmissible the other is likewise. The testimony of Ward being of the same character and the objection being made on the same grounds. The testimony sought to be introduced from Glover on cross examination is of slightly different character, and it may be that it was objectionable on the ground that it was not proper cross-examination. Objection was not, however, made upon that ground. If hearsay evidence is admissible at all it should be open equally to both sides. The jury were clearly entitled to say whether the committment of Clement, Jr., to the Industrial School showed him to be an industrious, good boy likely to be very profitable in case he lived. The best evidence, as we understand the law, of his committment would be the instrument itself.

Plaintiffs in error respectfully urge upon your Honors that in connection with these rulings error was committed which it is evident wrought to the detriment of plaintiffs in error in a most substantial manner and resulted in a verdict much too large under the circumstances.

ARGUMENT NO. 2.

THE VERDICT IS EXCESSIVE.

The verdict as it stood originally and as it stands at the present time is wholly unjustified by the evidence. Clement, Sr., testified his son gave him \$15.00 on one occasion. (Tr., p. 26, 28.) He did not know what salary the boy was paid and gave no testimony which would justify a jury in drawing any conclusion at all with respect to the earning

capacity of the boy or the amount he would be liable to turn over to his father. The jury were left to conjecture and speculation on these important questions.

Glover testified that the boy had been in his employment for four months (Tr., p. 47). Under the testimony Clement, Jr., was turning over money to his father at the rate of \$15.00 for four months, or \$3.75 for one month. Lacking five years and one month of twenty-one, he would turn over to his father at the same rate \$228.75. As the verdict stands it is approximately seven times that amount, and is, we shall respectfully submit, upon its face in view of the testimony exorbitant and unjustifiable and shows the jury based its verdict upon sympathy—not evidence.

ARGUMENT NO. 3.

NEITHER THE PLEADINGS NOR THE EVIDENCE
JUSTIFY THE RECOVERY BY THE DEFEND-
ANT IN ERROR AGAINST THE PLAINTIFFS IN
ERROR ON THE DOCTRINE OF THE LAST
CLEAR CHANCE.

This case was tried on the theory that the complaint states a cause of action under the doctrine of the last clear chance. The Judge instructed the jury that that was the theory which the action was brought and tried (Tr., p. 99). It was that theory upon which it was permitted to go to the jury at all. Clement, Jr.'s, contributing negligence, which was definitely established by all of the testimony and uncontradicted by any of the testimony, would otherwise preclude a recovery.

It is the contention of plaintiffs in error that the complaint is not sufficient to state a cause of action in favor of the defendant in error and against the plaintiffs in error under that doctrine.

Your Honors will note that the pleading recites only that Clement, Jr., WAS COMING in the way of the train, and that plaintiffs in error saw him COMING in the path of the train. That is not sufficient. We take it that there is no doubt in any jurisdiction about the effect of contributing negligence. It defeats the right of recovery with the single exception sought to be plead in this case. That is, contributing neglect does not defeat a plaintiff's cause of action when the pleadings and the evidence show that after plaintiff's negligence takes him into a place of peril his said negligence becomes remote for the reason that he is discovered in a place of peril, and after that time the plaintiff being no longer negligent the defendant fails to exercise ordinary care to avoid injuring plaintiff or his property. Under such circumstances the contributing negligence of the plaintiff does not preclude his recovery against the defendant. The courts look with disfavor and scrutinize closely both pleadings and the testimony in all cases in which it is sought by plaintiff to avoid the consequences of his own negligence. That being true, the rules of the courts and the law of the land is clear and explicit, and these elements must be found, pleaded and proved before the plaintiff is permitted to recover.

The first element is the exposed condition brought about by the negligence of the plaintiff or the person injured.

The second, the actual discovery of the plaintiff or the person injured in the place of peril by the party sought to be charged. This discovery must be under such circumstances that the defendants in the action have an opportunity in which to exercise ordinary care to avert the accident, and the circumstances must be such that the primary negligence of the plaintiff becomes remote and inoperative.

Third, there must be a failure of the defendant after actual discovery and after the negligence of the plaintiff ceases to operate, to use ordinary care to avert the accident and damage.

The doctrine of the last clear chance is well established in Federal law and the particular incidents that attach to a proper application of the doctrine have been repeatedly specified. We call the attention of the court to the case of *Iowa Central Railway Co. v. Walker*, 203 Fed. 685. That case is on all fours with the proposition here urged, and we quote a considerable portion of the opinion in that case:

“But, as I have already said to you, down to the time he was within the danger limit, in my judgment, there is nothing to be considered by you. Now, after he was within the danger limit, could he, by the exercise of diligence, have been seen by the engineer to be inside of the danger limit? Then, from that point, had this engineer exercised care and freedom from negligence, as he ought to do, could he then have averted the injury? If not, then your verdict will be in favor of the company. If he, the engineer, could have averted the injury after he saw the hazardous position in which the plaintiff had placed himself, then you will find a verdict for the plaintiff.”

"This instruction was faulty, in that it submitted to the jury the question as to whether or not, in the exercise of diligence on the part of the engineer, he could have discovered that the plaintiff was inside the danger limit. The instruction in that respect was accepted to by defendant.

"In *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459, Justice Van Devanter, then Judge Van Devanter, speaking with regard to the exception which permits plaintiff to recover, notwithstanding his own contributory negligence, said:

"The exception does not apply where the plaintiff's negligence or position of danger *is not discovered* by the defendant in time to avoid the injury.'

"In *Hart v. Northern Pac. Ry. Co.*, 196 Fed. 180, 116 C. C. A. 12, this court said:

"It presupposes or concedes the existence of contributory negligence, and seeks to avoid its consequence by subsequent occurrences. If it were true that Starr was in a state of actual peril, that the defendant *had actual knowledge* of that peril, and *after that knowledge was acquired* failed to exercise ordinary care to prevent injuring him, these facts might create a cause of action, or might excuse the contributory negligence which brought Starr into his position of peril.'

"Numerous other authorities might be cited to the same effect, to-wit, that the defendant's liability under what is known as the last clear chance doctrine is *only where, after actual discovery* of the plaintiff's perilous position the injury could be avoided by the exercise of ordinary care and diligence."

The Supreme Court of the State of Montana has passed upon the question of the doctrine of the last clear chance, and there is no conflict between the laws of this state and this rule of the Federal courts. The case of *Dahmer v. Northern Pacific Railway Co.*, 48 Mont. 152; 136 Pac. 1059,

was a case in which the Supreme Court was called upon to determine the law with relation to this doctrine. Mr. Chief Justice Brantly wrote the opinion of the court.

“It may be remarked, however, that the rule is limited in its application to those cases only in which the plaintiff, or the person injured or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. (1 Thompson on Negligence, Sec. 228.) A case calling for its application embodies three elements, viz: (1) The exposed condition brought about by the negligence of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property, some other duty imposed by law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered.” (And citations.)

It is common custom for plaintiffs to seek to avoid the consequences of contributing negligence by urging upon the courts that they should still be permitted to recover if defendants, or their servants, could avoid the consequences of plaintiff's negligence. So it was in the case of

Dunworth vs. Grand Trunk Western Ry. Co., 127
Fed. 307.

In that case the Circuit Court of Appeals for the Seventh Circuit said about one who went upon the railroad track without taking sufficient precautions for his own safety.

“Without necessity he deliberately placed himself in a situation of known danger. In the open space he would have been immune from danger, and with equal facilities for seeing in both directions. He had no right to stand upon the track. Taking the risk, the consequences should not be imposed upon another.”

“It is also said that the contributory negligence of the deceased should not prevent a recovery if the locomotive engineer, in the exercise of ordinary care, might have avoided the consequence of the deceased’s negligence; * * * There are no facts disclosed in this record calling for the application of the modification of the rule. It does not appear that the presence of the deceased upon the track was observed by the locomotive engineer, or that after seeing him, and after knowledge that he was unobservant of his danger, there was time to avoid the catastrophe. To bring the case within the modification of the rule it is incumbent upon the plaintiff to make a showing calling for its application. * * * ”

It is not the contention of the plaintiffs in error that recovery should never be had under the doctrine of the last clear chance, but plaintiffs in error seriously do contend that the issue upon which the recovery is based must be full and complete, and the defendant in error signally failed to establish any of the necessary averments.

In the case of

Southern Ry. Co. vs. Carroll, 138 Fed. 638,

a traveler, who was familiar with a railroad crossing, just

as David Clement, Jr., was in this case, approached a crossing at night in his carriage which had drawn side curtains. He did not look or listen for the approach of a train which was in sight and hearing. He was driving along at a dog trot. He had crossed at that point several times in the day time. Under such circumstances, the Circuit Court of Appeals for the Fourth Circuit says that the law of the case is clear.

“The traveler is required to give way to any train which is in sight or hearing * * *. * * * he must begin to look and listen at such distance from the track as to enable him to stop in case he hears an approaching train. * * *. It is no excuse for failure to look and listen that the traveler did not think just then about the railroad, or its danger, or that his attention was diverted by some trivial matter. *Schofield v. Chicago, etc., R. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224. ‘Nor is it an excuse that the usual or statutory signals of approaching trains were not given.’ ”

Under the circumstances he was guilty of wilful and inexcusable negligence and under the circumstances the trial court should have directed a verdict for the defendant.

The case is similar in facts to the one under consideration by your Honors. It is quoted, not to show any application of the doctrine of the last clear chance, but to show that, in the opinion of the court, under the circumstances the negligence of the defendant was an immediate proximate cause of his injury. That being true, the doctrine of the last clear chance cannot be invoked to escape the rule, because the doctrine can be invoked only when some act of

the defendant transpiring subsequent to plaintiff's negligent acts makes the negligence of the plaintiff remote and not immediate.

Reasonable men can draw only one inference from the testimony in this case. That inference is, that the Clement boy was never in danger until he became upon the track of the defendant company. He could have stopped his team, which testimony shows were mild mannered and unafraid at the last instant of time, before he reached a place of danger, and thereby could have averted the accident and injury. Taking no steps to protect himself he drove upon the track immediately in front of the approaching locomotive, and the fact that the engineer SURMISED or CONJECTURED a brief instant before the accident that a dangerous situation would occur, is not SUFFICIENT SHOWING of DISCOVERY in a place of peril.

Powers vs. Iowa Cent. Ry. Co., 136 N. W. 1049

was a case brought on account of a crossing accident. Verdict and judgment were had for plaintiff, and on appeal to the Supreme Court of Iowa, the doctrine of the last clear chance was invoked. The testimony in this case showed that the train was running at a rate of speed prohibited by the town ordinance. Plaintiff had lived in the neighborhood for many years, was familiar with the crossing. He had an unobstructed view for a considerable distance. His horses approached the crossing at a trot, and when two or three rods from the crossing his team became startled, and so he could not look up to discover whether

a train was approaching or not. The engineer saw the plaintiff when he was eight or ten rods from the track, but the engineer

“ * * * had the right to suppose that plaintiff would exercise reasonable care and not drive on to the track ahead of the train, * * * ”

Nevertheless, the plaintiff did drive on, a collision occurred, and the Supreme Court of Iowa says that the contention that the doctrine of the last clear chance should be applied here cannot be sustained, and the trial court should have directed a verdict for the defendant.

It is too plain to require argument that railway companies cannot be required to stop their trains every time they see travelers approaching the crossing. No citation of authority is required on this contention.

The engineer had a right to presume even until it was too late to avert the accident that the driver of the milk wagon would, as he so readily could have, stop his horses and permit the train to pass in safety. It is an every day experience of train crews to see men approaching, just as this team approached, and stop in close proximity to the crossing, but not in a place of peril; and the conjecture or surmise of the engineer that this team might not stop falls far short of an actual discovery in a place of peril. To be sure there was never a discovery of Clement, Jr., at all until after the accident had happened, and so far as the plaintiffs in error are concerned on this aspect of the case, the horses and wagon might have been proceeding along

the highway without a driver. If any presumption arises from the facts, it is a presumption that the engineer would be justified in believing there was no driver on board.

The language of

Boyd vs. Southern Ry. Co., 78 S. E. 548

is precisely in point here :

“He was not in peril until he started to cross the track, and it was then too late for the engineer to have stopped his train or avoided injuring the plaintiff if he had been on the lookout and had seen the plaintiff’s danger.”

The plaintiff in this case does not allege a discovery in the place of peril. It alleges no more than that the train crew should have anticipated peril, a pleading which is not sufficient according to the authorities. It is not a condition of mind nor a conclusion from an inference that the doctrine of the last clear chance is based upon. It is based upon discovery, a physical condition of peril to plaintiff’s decedent.

Bates vs. Louisville & N. R. Co., 64 So. 298,

was a case in which the doctrine of the last clear chance, or, as the Supreme Court of Alabama terms it, subsequent negligence, is very similar to the present case. Plaintiff was considered to be negligent, and if defendant was negligent at all, plaintiff urged that the jury might have found the engineer guilty of subsequent negligence in failing to

sand the track and thereby stop the train in time to avoid the accident. In that case the wagon in which plaintiff was riding was born a distance of one hundred feet. The evidence showed that a very few seconds elapsed, and the court held as a matter of law that the engineer had done all possible. They, therefore, refused to hold the doctrine of the last clear chance was applicable and affirmed the judgment of the trial court.

There is in this case an absolute failure on the part of the defendant in error to allege the discovery of Clement, Jr., in a place of peril, and the complaint goes no further than to allege that plaintiffs in error should have surmised or conjectured that the milk wagon would come into a place of peril, and the complaint, therefore, does not state a cause of action; and, moreover, all of the evidence shows that there never was a discovery of Clement, Jr., in a place of peril, and the proof, therefore, falls short of establishing liability under the doctrine. There was no danger until the team was actually upon the track. At any instant of time prior to the accident the team could have been stopped and the accident averted. Under such circumstances, there is no room for the application of the doctrine had it been sufficiently plead.

Wherever the doctrine of the last clear chance, the humanitarian doctrine, the doctrine of subsequent peril, or the doctrine of third degree negligence is recognized by the courts it is narrowly circumscribed. Man is primarily responsible for his own safety, and when he pleads or proves that his negligence has got him into trouble he will be permitted to recover only when he shows clearly that

his own negligence has become remote and another immediate, and the other injured him subsequent to the operation of his primary negligence. If his negligence is contemporaneous, concurrent and active both to the time and place of the accident there can be no recovery. The authorities cited so hold.

From the great wealth of additional authority on this point we shall quote but brief excerpts from a few.

Wise v. Cleveland, C., C. & St. L. Ry. Co., 103 N. E.
866,

Cites with approval

Indianapolis Traction, etc., Co. v. Croly, 96 N. E.
973,

“As we have heretofore said, the doctrine of last clear chance applies to cases only where the defendant’s opportunity of preventing the injury by the exercise of due care was later in point of time than that of the plaintiff. This is a rule of universal application, and it affords the test of the applicability of the doctrine to a particular case. As a sort of corollary to this rule, the courts have stated as a general proposition that, where the person injured has negligently exposed himself to the injury, he cannot recover on account of the negligence of the defendant by an application of the doctrine of last clear chance, unless it appears that the defendant’s negligence intervened or continued after the negligence of the plaintiff ceased. Differently stated, the proposition is that, if the negligence of the injured party concurs with that of the defendant up to the very instant of the accident, or if it continues as long at least as the negligence

of the defendant, the doctrine cannot be properly applied against the defendant.”

Denver City Tramway Co. v. Cobb, 164 Fed. 41,

This also rules that the case is within the exception to the general rule making contributory negligence a defense which is known as the last clear chance doctrine, but there are two reasons why that is not so.

First: The exception does not apply where there is no negligence of the defendant supervening subsequently to that of the plaintiff, as where his negligence is continuous and operative down to the moment of the injury; second, where his negligence or position of danger is not discovered by the defendant in time to avoid the injury.

St. Louis & San Francisco Ry Co. v. Schumacher,
152 U. S. 77;

Illinois Central R. Co. v. Ackerman, 144 Fed. 959;

Missouri Pacific Ry. Co. v. Moseley, 57 Fed. 921;

Gilbert v. Erie R. Co., 97 Fed. 747;

United States Spruce Lumber Co. v. Shumate, Supreme Court of Appeals of Virginia, January 13, 1916, 87 S. E. 723,

says

“It appears clearly from the allegations of the fourth, and also from the allegations of each of the other counts of his declaration, that the plaintiff did

not exercise due care for his own safety in attempting to cross over the railroad track, and thereby was guilty of negligence, which negligence continued down to the moment of the accident and contributed to the injury to him, whereby the case made is one of concurring negligence, and he can have no recovery.

In the circumstances and under the conditions prevailing at the place of the accident, related in the declaration, the negligence of the plaintiff as well as that with which the defendant is charged, was continuous and practically instantaneous, covering only a short distance of space between the point at which the trainmen could see the plaintiff approaching the crossing and a still shorter distance from the point at which he could have seen the approaching car and engine had he looked, and the crossing; so that the doctrine of the 'last clear chance,' which is invoked throughout the declaration, could have no sort of application to the facts of the case. That doctrine presupposes an appreciable difference in time between the earlier negligence of the plaintiff and the latter negligence of the defendant, and it must appear that, in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by it by the exercise of ordinary care, it negligently failed to do something which it had a clear chance to do to avoid the accident. *Real Estate Co. v. Gwyn*, 113 Va. 337, 74 S. E. 208; *Roanoke Ry. Co. v. Carroll*, *supra*; *Smith v. N. & P. Tr. Co.*, *supra*.

In this case it is a necessary conclusion from the facts alleged in the declaration and in each count thereof that the plaintiff was guilty of contributory negligence, simultaneous and concurrent with that of the defendant, and continuing up to the moment of the accident to him, and that the defendant could not have, by the exercise of ordinary care and diligence, saved him from the result; and therefore he fails to make by his declaration a case entitling him to recover

of the defendant damages for his injury.”

State v. New York Ry. Co., 96 Atl., 809, Court
of Appeals of Md., Feb. 9, 1916.

“It is clear to us that the last negligent act was the act of Cullen in attempting to cross the track in the manner in which he did, and the doctrine here sought to be applied is only applicable when the defendant’s negligence in not avoiding the consequences of the plaintiff’s or deceased’s negligence is the last negligent act. It can never be invoked when the plaintiff’s or the deceased’s own act is the final negligent act.”

Stephenson v. Parton, et al., Supreme Court of
Washington, Feb. 17, 1916, 155 Pac., 147.

It is contended that the doctrine (of the last clear chance) does not apply where both parties are equally guilty of concurring acts of negligence, each of which at the very time when the injury occurred contributed to it. This no doubt is the rule.

Todd v. Cincinnati, N. O. & T. P. Ry. Co., Supreme
Court of Tennessee, April 8, 1916, 185 S. W. 62,

where the acts of misconduct or negligence on the part of plaintiff and defendant are not successive but simultaneous, and in such cases where the act of plaintiff has not terminated as a casual factor, there should be no recovery; and also

“ * * * nor may a plaintiff who is acting so recklessly as to be in utter disregard of his own safety be

heard to invoke the application of the principle above discussed," (the doctrine of the last clear chance).

This court says that it believes that an adult plaintiff cannot be found to have been allowed a recovery who went on to a railroad track under circumstances very similar to that of the case at bar. Other cases which throw some light on the doctrine of this application are:

Landis v. Interurban Ry. Co., Supreme Court of Iowa, May 14, 1914, 147 N. W. 318;

Gast v. N. P. Ry. Co., Supreme Court of North Dakota, May 28, 1914, 147 N. W. 793;

Whitesides v. C., B. & Q. Ry. Co., 172 S. W. 467;

Rollison v. Wabash Co., 160 S. W. 994;

Rosenberger v. Wells Fargo Co., 167 S. W. 433;

Johnston v. Delano, et al., Supreme Court of Nebraska, July 1, 1916, 158 N. W. 1034;

Duggan v. C., M. & So. P. Ry. Co., Supreme Court of Iowa, Sept. 23, 1916, 159 N. W. 228;

Scharf v. Spokane Co., Supreme Court of Washington, August 21, 1916, 159 Pac. 797,

which cites with approval 29 Cyc. 531. This rule (last clear chance) has no application if the negligence of the person injured and of defendant are concurrent, each of which at the very time the accident occurs contributes to it.

Plaintiffs in error therefore respectfully urge upon your Honors that the case at bar presented no facts for the determination of a jury, but the court should have given the binding instructions asked for, and the motion for a directed verdict was well founded on both law and fact and should have been sustained.

ARGUMENT NO. 4.

CLEMENT, JR., WAS GUILTY OF CONCURRENT NEGLIGENCE WHICH DEFEATS THIS CAUSE OF ACTION.

The testimony in this case at bar makes out a complete typical case of concurrent negligence. Clement, Jr., approaches the railroad crossing at a speed almost equal to that of the train itself. Both train and wagon are equally in view of each other. The train reaches the crossing with sufficient momentum to carry it a considerable distance. The team reaches the crossing jogging along at a very uniform rate absolutely unchecked. Clement, Jr., was never in danger until actually upon the track. Under such circumstances

Illinois Central Ry. Co. vs. Ackerman, 144 Fed. 959,

decided by the Circuit Court of Appeals of the Eighth Circuit is exactly in point. Plaintiff's intestate drove upon a street crossing over defendant's railroad track in front of a string of cars which were being backed. He was struck

and killed. He was well acquainted with the crossing. He could have seen along the tracks for a distance of several hundred feet, but yet he drove upon the tracks slowly and without stopping. The cars which ran him down were going from five to twelve miles an hour. The brakeman and fireman observed the wagon as it slowly approached the track. They supposed the driver would drive up close and stop, as was the custom. He did not stop and so was killed. It presented a case of negligence on the one side and contributing negligence on the other which would preclude a recovery, but the plaintiff was permitted to recover in the trial court on the theory that the railway company's employes having perceived that the deceased was about to drive upon the track, and was not using his sense of hearing, did not use reasonable or ordinary care to avoid the accident. That is to say, the trial court permitted the application of the doctrine of the last clear chance. The Circuit Court of Appeals of the Eighth Circuit says that there was no need of discussing the facts nor the law of last chance, for they said they were clear that in no admissible view was the doctrine to be applied to the case at bar. They did not see the deceased because the curtains of his wagon top were drawn, but even then the deceased could have observed the train for as great a distance as the men on the train could have observed his wagon. He failed in the duty imposed upon him by law, to look and listen before he went into danger, and

“the men upon the train were not obliged under the circumstances to anticipate his negligence. They could very well have assumed either that he knew of

the approach of the cars and intended to stop at the customary safe distance, or that he would look when near the track and then stop before going upon it.”

The train crew could not know that the man was absent minded or inattentive.

“He was not in a place of danger until it was too late to prevent the accident. The negligence of the employees of the railroad company and that of the deceased were CONCURRENT and CONTINUOUS down to the very moment of the collision, and there is no room for the contention that the negligence of the latter should be regarded as a known condition upon which the negligence of the former subsequently operated.”

The request of the Railway Company for a directed verdict should therefore have been granted.

Again in

Atchison, T. & S. F. Ry. Co. vs. Taylor, 196 Fed.
878,

the Circuit Court of Appeals for the Eighth Circuit holds in a case in which the contributory negligence would have been a plain defense for the company had the plaintiff not relied on the last chance rule.

“The limitations of the last chance rule have been quite often defined by this court. It does not supplant or destroy the doctrine of contributory negligence, but is an exception or qualification, and depends upon special and particular conditions which must be made to appear. It presupposes negligence of the defend-

ant and contributory negligence on the part of the person injured and imposes liability if after perceiving the dangerous position in which the latter has negligently placed himself the injury might then have been avoided by the former by the exercise of reasonable care. It does not apply where there is no negligence of the defendant occurring after that of the person injured, or where the defendant does not discover his exposure to danger in time to prevent the accident. *Illinois Central Railway Co. v. Ackerman*, 76 C. C. A. 13, 144 Fed. 959; *Denver City Tramway Co. v. Cobb*, 90 C. C. A. 459, 164 Fed. 41; *St. Louis & S. F. Railroad Co. v. Summers*, 97 C. C. A. 328, 173 Fed. 358; *Illinois Central Railway Co. v. Nelson*, 97 C. C. A. 331, 173 Fed. 915. It must affirmatively be pleaded, if relied on. *Hart, Adm'r. v. Railway*, 196 Fed. 180, 115 C. C. A. (decided at the December term, 1911.)

The Supreme Court of Vermont in

Labelle vs. Central Vermont R. Co., 88 Atl. 517,

said

“Should the case have been submitted to the jury upon the doctrine of the ‘last clear chance’? The negligence of the plaintiff proximately contributing to the accident continued as long as it was possible for him to avoid personal injury. He was walking between the front wheels and the body of the dump cart, his horses perfectly manageable. The space between the forward wheels and the body was sufficient for cramping purposes, and there was no evidence tending to show that it was not large enough for the plaintiff to go through and outside the wheels, thereby to leave the team at any time before he went upon the track, if need be, for his safety. He could have

done this until the train was so near, according to the undisputed evidence, that it was no longer possible for those in charge to prevent a collision. Thus it appears that the plaintiff's negligence, proximate in character, was concurrent with that of the defendant (assuming that the defendant was negligent) as long as it was possible for the latter to avoid the accident. In this respect the case is not distinguishable from that of *Flint's Admr. v. Central Vermont Ry. Co.*, cited above, and the doctrine of the 'last clear chance' does not apply. *French v. Grand Trunk Ry. Co.*, 76 Vt. 441, 58 Atl. 722; *Butler v. Rockland, etc., St. Ry. Co.*, 99 Me. 149, 58 Atl. 775; 105 Am. St. Rep. 267; *Green v. Los Angeles Terminal R. Co.*, 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68.

Judgment affirmed."

In

Olson vs. Northern Pacific Ry. Co., 87 N. W., 843,

the Supreme Court of Minnesota said about a man who walked directly in front of a railway company train which had sounded the alarm three hundred feet from the point of accident and which gave no other signals, that the injured man could by the slightest movement of his head have discovered the hazard and by the slightest check in his movements have avoided the same; though plaintiff strenuously urged that the train crew could have discovered his peril in time to have saved his life, and pleading under the last clear chance, though not so termed in the opinion itself; that there was no evidence under the circumstances of conduct on the part of the train crew which would excuse the negligence of plaintiff's intestate.

Dyerson vs. Union Pacific R. Co., 87 Pac. 680; 7
L. R. A., N. S. 132,

is a very plain case with a very plain note on the doctrine of concurrent negligence. It is exactly in point and well reasoned. We get from head note No. 4 of the L. R. A.

“Last clear chance—continuing contributory negligence.

4. A plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, cannot recover damages therefor, although the defendant ought to have discovered (but did not, in fact, discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort. (November 10, 1906.)”

The Supreme Court of Ohio says in

Drown vs. Northern Ohio Traction Co., 81 N. E.
326,

the doctrine of last clear chance does not apply where the plaintiff has been negligent and his negligence continues and concurrently with the negligence of the defendant directly contributes to produce the injury. It applies only where there is negligence of the defendant subsequent to and not contemporaneous with the negligence by the plaintiff, so that the negligence of the defendant is clearly the

proximate cause of the plaintiff's injury not the remote cause.

Bruggeman vs. Illinois Central Ry. Co., 123 N. W.
1007,

is a case in which the Supreme Court of Iowa had under consideration the last clear chance doctrine. They said if both plaintiff and defendant could have prevented the accident but neglected to do so their negligence was concurrent and the last clear chance doctrine does not apply.

“There is a general agreement in the authorities that, where an engineer actually sees a person in a position of danger, and then fails to do what he reasonably can to prevent an accident, the railroad company is held responsible for the resulting injury, irrespective of the question of contributory negligence. If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. IF, HOWEVER, EACH HAD SUCH POWER, AND EACH NEGLECTED TO USE IT, THEN THEIR NEGLIGENCE WAS CONCURRENT, AND NEITHER CAN RECOVER AGAINST THE OTHER.”

So then in this case, taking the view most favorable to the plaintiff, the best that can be said for him is that his negligence concurred with defendants’.

The Supreme Court of California has given great attention to the application of the doctrine of the last clear chance, and to the doctrine of concurrent negligence. In the case of

Green vs. Los Angeles Terminal Ry. Co., 76 Pac.
719,

the court considered a state of circumstances quite similar to those of the case at bar, and concluded that

“4. The doctrine of last clear chance applies in cases where defendant, knowing of plaintiff’s danger, and that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury, but has no application to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it.”

The doctrine of last clear chance applies in cases where defendant, knowing of plaintiff’s danger, and that he cannot extract himself from it, fails to do something which it is in his power to do to avoid the danger. It has no application, however, to a case where both parties are guilty of concurrent negligence, each of which, at the very time when the accident occurs, contributes to it. In the Green case on a motion for re-hearing on the original opinion in the case making the company responsible for any damages, the rule quoted was reached. The opinion both on the original hearing and on the rehearing is long and closely reasoned. It would be impracticable to quote further than the headnote unless we elected to quote the entire opinion, which is readily available to your Honors, and which fully sustains the rule as announced in the note cited.

The Supreme Court of Kansas in the case of

Coleman vs. Atchison, T. & S. F. R. Co., 123 Pac.
756,

denied a recovery under the last clear chance, saying:

"The plaintiff and the driver negligently failed to look for an approaching train, when, if they had looked after passing by the obstructing box cars, they could have seen the cars coming from the west in time to have stopped the team and avoided the collision. The conductor, had he kept a proper lookout, might have seen them and stopped his train, and should have done so if they appeared to be heedless of its approach, and in that situation was negligent in failing to keep a proper lookout. The two men were also negligent in failing to look for a train after passing the end of the box cars on the side track. The collision then was the immediate result of the concurring negligence of both parties.

In *Dyerson v. Railroad Co.*, 74 Kan. 528, 87 Pac. 680, it was said in the opinion: 'The test is, what wrongful conduct occasioning an injury was in operation at the very moment it occurred or became inevitable? If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power, and each neglected to use it, then their negligence was concurrent, and neither can recover against the other.' "

The doctrine of concurrent negligence is not new to jurisprudence. Among the older cases one of the best reasoned is

O'Brien vs. McGlinchy, Supreme Court of Maine
Reports, 4 Pulsifer, 552.

The case holds that for the doctrine of the last clear chance to be applicable the negligence of defendant and plaintiff should not operate conjunctively. In cases where the negligent acts of the parties are distinct and independent, and the act of the plaintiff preceeds that of the defendant it is considered that plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been averted by the other. The ancient English cases are cited in support of that contention, which we urge is still the law. However, the court had this to say :

“But this principle should not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness the plaintiff is injured; nor where the negligent act of the defendant takes place first and the negligence of the plaintiff operates as an intervening cause between it and the injury.”

And the court says there may be other exceptions to the last clear chance rule. The case at bar falls clearly within the view of this old Maine case, that no recovery can be had under the doctrine of the last clear chance, but is a typical case of concurrent negligence.

C. & O. Ry. Co. v. Saunders' Adm'r., 83 S. E. 374,

where a young man who is in possession of his normal faculties got in front of a train at a public pathway without looking, and who walked down the track without looking back, was killed by a train which had been in plain sight

for a considerable distance, but whose crew was negligent in not discovering the danger. There was MUTUAL and CONCURRENT negligence which continued up to the very moment of the accident, and recovery could not be had under such circumstances. The duty of each being equal, and each being equally guilty of a breach of the duty.

Norfolk Southern Ry. Co. v. White's Adm'x., Supreme Court of Appeals of Virginia, 84 S. E. 646,

cites with approval and as binding authority the case of

Real Estate, Etc., Co. v. Gwyn, 74 S. E. 208.

"It must appear that in contemplation of the entire situation, after the danger of the plaintiff became known to the defendant, or ought to have been discovered by him by the exercise of ordinary care, he negligently failed to do something which he had a clear chance to do to avoid the accident. The doctrine can have no application to a case where the negligence of both plaintiff and defendant is simultaneous and concurrent."

Ryan v. Union Pacific R. Co., 151 Pac. 71,

says

" * * * we are committed to the rule that the doctrine (of the last clear chance), in a proper case, is also applicable where the perilous situation of the party injured could or ought to have been discovered, but, because the assumed negligence of both parties was, in such respect ACTIVE, CONCURRING, COMBINING and CONTRIBUTING at the very

time of the impact, and the one as direct and proximate as the other; * * * then the negligence of both was active and concurring up to the very time of the impact, and the collision the result of the combined and concurring negligence of both, and the one as direct and proximate as the other."

Under such circumstances recovery is denied under the doctrine of the last clear chance.

Gilbert v. Missouri Pacific Ry. Co., 139 Pac. 380,

says the plaintiff was engaged in an active disregard of his own safety up to the last moment when he might have been saved, and consequently has no standing to invoke the doctrine of the last clear chance.

Wabash Ry. Co. v. Tippecanoe Loan & Trust Co.,
98 N. E. 64,

says there is here no room for the application of the doctrine of last clear chance, for decedent had the power, down to the last instant, to avoid the injury, and quotes

Evans v. Adams Express Co., 23 N. E. 1039,

which uses this language:

"Where the negligence of two persons is contemporaneous, and the fault of each operated directly to

cause the injury, the rule deducible from the authorities is that the plaintiff cannot recover, if by the exercise of ordinary care on his part he might have avoided the injurious results of defendant's negligence."

It cites a long list of cases in support of the rule.

Consumers' Brewing Co. v. Doyle's Adm'x., 46 S. E.
390,

holds that plaintiff cannot recover if guilty of continuing and concurrent negligence which operated at the same time and until the very point of time or instant with the negligence of the defendant.

Southern Ry. Co. v. Bailey, 67 S. E. 365,

is a strong case for plaintiffs in error. It holds that when an engineer sees a man on a railroad track it is not necessarily a discovery in places of peril, since the man on the track, if in possession of his faculties, may avoid injury by using ordinary care to discover the approach of the engine. It is only when those in charge of a train discover that the one on the track is unconscious of his danger or helpless that it becomes their duty to seek to save him from damage.

In the case at bar there was no discovery of Clement, Jr., at all upon the track, nor was it made apparent at any time when a collision could have been avoided, that Clement, Jr., would not stop and himself avert the accident.

In the Bailey case a drayman stood on a cement sidewalk so close to a track that he was struck by a portion of an engine which was approaching at the rate of five or six miles an hour. The drayman could have seen the engine approaching for a distance of a thousand feet. On the other hand, the engineer saw the drayman but made no effort to stop the train. The court held that the negligence of the drayman continued right up to the time and place of the accident, and in spite of the negligence of the engineer, the doctrine of last clear chance did not apply because the drayman being apparently in possession of his faculties could have stepped back and escaped the injury at any time; and, hence all the facts made out a clear case of concurrent negligence for which there can be no recovery. The duty of the parties was equal, and each was equally guilty of its breach.

And so, we respectfully urge upon your Honors, that David Clement, Jr., and plaintiffs in error were equally chargeable with the duty of avoiding the accident which was so fateful to Clement, Jr., and under the facts it is incontrovertibly true that each was equally guilty of a breach of its duty, if your Honors agree with the jury that plaintiffs in error's servants were negligent at all.

WHEREFORE, plaintiffs in error respectfully urge upon your Honors that the complaint does not state a cause of action under the last clear chance doctrine; that the evidence fails to prove the doctrine of the last clear chance; and that the David Clement, Jr., was guilty of concurrent negligence which precluded a recovery by the

defendants in error. We therefore submit that the judgment should be reversed.

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FRED J. FURMAN,
A. J. VERHEYEN,
Attorneys for Plaintiffs in Error.

Service of the above and foregoing Brief is hereby acknowledged, and copy thereof received, this.....^{13th}..... day of February, 1917.

BK. Wheeler

.....
Attorney for Defendant in Error.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY, a
corporation, CHICAGO, MILWAU-
KEE & PUGET SOUND RAIL-
WAY COMPANY, a corporation,
J. E. WOODS, and M. J. CHAP-
PELL,

Plaintiffs in Error,

vs.

DAVID CLEMENT,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

B. K. WHEELER,

JAMES H. BALDWIN,

Attorneys for Defendant in Error.

Filed

MAY 14 1907

F. D. Monckton,
Clerk.

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Plaintiffs in Error,

vs.

DAVID CLEMENT,

Defendant in Error.

STATEMENT OF FACTS.

This action was brought by David Clement, Sr., the father of David Clement, Jr., deceased, to recover damages which the plaintiff, as parent, suffered by reason of the death of his son.

The charging part of the complaint in substance charges and the evidence shows, David Clement, Jr.,

was on the 5th day of November, 1912, at about the hour of four o'clock a. m., driving a pair of horses and riding in an enclosed milk wagon which was drawn by said horses on Montana Street, a public street, in the incorporated City of Butte, toward and near the intersection of Railway Company's tracks and said street and was not observant of the approach of a train which was moving along said track in a westerly direction, said engine being under the control of J. E. Woods and M. J. Chappell; that said David Clement, Jr., was coming directly within the way of the said approaching train; that the said engineer and said Chappell did see David Clement, Jr., coming directly in the path of said engine, *and did see that said boy was in danger of being struck by said engine and that he was unobservant of the approach of said engine; that the defendant then, after so seeing the boy in danger, negligently drove and ran said engine against the vehicle on which the said David Clement, Jr., then and there was, without giving him any warning of the approach of said train and without lowering the gates which were at the said crossing, and by reason of the negligent management and operation of said engine the said Clement boy was dragged by the same over and along the ground and over and along the railroad track for a great distance and was drawn and dragged under the wheels of said engine and the same was then and there run and driven over him, whereby he was crushed and injured from which injuries he thereafter died.*

No question is here raised and none could be as to the right of the father to maintain the action.

Haddox vs. Northern Pacific Ry. Co., 46 Mont., 185; 127 Pac. 152.

The facts in this case relative to the negligence of the defendants are the same as in the case of David Clement, as administrator of the estate of David Clement, Jr., vs. Chicago, Milwaukee & St. Paul Railway Company, reported in 226 Federal 426.

The same question was raised by the defendant in that case as in this with reference to the doctrine of concurrent negligence and the last clear chance, but unfortunately, was not passed upon by the Court. We presume, however, that the Court felt that it had laid down in Great Northern Railway Company vs. Harmon, 217 Fed. 959, where this court holds that a trespasser is entitled to the benefit of the doctrine of the last clear chance, the rule which would hereafter be followed in this district.

In Great Northern Ry. Co., v. Harman, (*supra*) the court says:

“A cause of action arose in his favor, if the defendant actually knows of his peril and thereafter fails to exercise ordinary care to avoid injuring him; and the plaintiff’s contributory negligence cannot defeat the action, if it can be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of that negligence.”

The testimony shows that the father is a miner,

and that he has worked in the mines of Butte for 27 years. That the boy was 16 years of age and that he had been driving a milk wagon for three months. That before he went to work on the ranch he was living with his father. He was a strong healthy boy and had a "good feeling" towards his father, as expressed by his father (Tp. 26). Out of his first month's pay he gave his father Fifteen (\$15.) Dollars. While he was working he came home to see he father. He quit school because he was ambitious to work. His mother is dead and the boy was being raised by his father.

Chappell who was one of the defendants, and on the train that struck the boy testified, "I saw the boy coming when I got to a point where the view was unobstructed, at a distance of about 330 or 340 feet. The train was going at "a little jog of a trot," about four miles an hour. I could see it was a covered wagon. The person in the wagon never made any attempt to stop but continued on same gain, the lines were slack. I gave the engineer one signal about 150 feet east of the crossing, may be a little more, it was a slow sign, and then when the wagon was about 75 feet away from the crossing he gave him signal to stop.

The engineer was obliged under the rules of the Company to obey any orders given him by Chappell. Chappell was riding on the rear end of engine looking out for obstructions. The engine was backing. The engineer could see practically the same distance as Chappell. They had twelve cars attached to the

engine with a tonnage of approximately 700 tons. The brakes had passed the car inspectors in the yards.

There is what is known as an angle cock at each end of an engine. When this is opened it has the effect of putting on the emergency, "When I gave the stop sign I made up my mind it was necessary to stop." The engine was not thrown into reverse.

"We went four car lengths and a half, and the engine and tender passed the crossing before the engine finally came to a stand still. The cars are 36 to 40 feet. There grade there is about one-half of one per cent."

Chappell was asked this question:

Q. I will ask you if it isn't a fact Mr. Chappell, that going at the rate of five miles an hour upon a track of the grade of the track of the Chicago, Milwaukee & Puget Sound at the place where the accident occurred, and for a distance of 150 feet east of it—if the air had been put on and the engine had been thrown into reverse, and the track sanded, if the engine hadn't ought to have been stopped in the distance of 25 feet, taking into consideration also the tonnage you had on this evening?

Q. First class condition?

A. Well, I imagine the stop could be made some where in that territory, in that neighborhood, anyway, under those conditions.

He further stated after some quibbling, that that train should have been stopped in from 25 to 40 feet.

There was an arc light over the crossing, and the rays extended for a block. The collision took place at four a. m.

W. J. McMaster testified, that the emergency brake was not applied until the engine was on the crossing (Tp. 59-60).

L. S. Groff, who had followed railroading for a long time said in answer to a hypothetical question that the train should have been stopped going at the rate of six or eight miles in an hour in fifteen feet.

James A. Brittian, who had been engaged in railroading as an engineer for sixteen years and was familiar with the engine in question and had driven the engine for a year and who was also familiar with the grade stated, "The train in the morning in question should have been stopped in from twenty to twenty-five feet.

ARGUMENT.

The verdict of the jury was twenty-five Hundred Dollars. When a motion for a new trial was made the trial court cut the amount of the verdict to Fifteen Hundred Dollars.

In the case of Haddox v. Northern Pacific Railway Co., (supra) the verdict was for Eighteen Hundred Dollars, and the evidence did not show that the boy had contributed any money to his father.

The reported case, however, does not show these facts.

While the recovery in this case is limited strictly to the probable pecuniary loss suffered by the

father, the factors upon which the jury may base their estimate of damages are: decedent's age, health, habits, earning capacity, disposition to aid beneficiaries, the age and circumstances of the latter, and the aid actually rendered them during decedent's lifetime.

Baltimore & Potomac Ry. Co. v. MacKey,
157 U. S. 72; 39 L. Ed. 624;

Michigan Central v. Vreeland, 227 U. S. 59;
57 L. Ed. 417.

In the above cases expressions like these are used or cited with approval.

“Nevertheless, the word ‘pecuniary loss’ as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife or child, * * * No hard and fast rule by which pecuniary damages may in all cases be measured is possible, * * * The rule for the measurement of damages must differ according to the relation between the parties plaintiff and decedent.”

It is true that the boy had only given the father Fifteen (\$15.) Dollars, out of his first month's wages, but the father who had worked and raised the boy by working in the mines for twenty-seven years in Butte could reasonably expect a steady boy to assist him in his old age.

In the case of Lundeen v. Great Northern Railway Company, 150 Northwestern Rep. 1088, the

Supreme Court sustained a verdict of Two Thousand Dollars, where the boy had given his father Ten (\$10.00) Dollars out of his first month's wages.

In *O'Malley v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 289; 45 N. W. 440, a verdict of Three Thousand Dollars for the death of a six year old child was held not excessive.

The same amount for the death of a laborer's child six and one-half ($6\frac{1}{2}$) years old was sustained in *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161; 49 N. W. 694.

See also—

Gray v. St. Paul City Ry. Co., 87 Minn. 280;
91 N. W. 1106;

18 Ann. cases, page 1225 for other cases;

Hutchins v. St. Paul, M. & M. Co., 44 Minn. 5;
46 N. W. 79;

Sieber v. Great Northern Ry. Co., 76 Minn.
269; 79 N. W. 95;

Swanson v. Oakes, 93 Minn. 404; 101 N. W.
949;

McVeigh v. M. & R. R. Ry. Co., 129 N. W.
852;

Hirschkovitz v. Penn. Ry. Co., 138 Fed. 438;

Hopper v. Denver & R. G. Ry. Co., 155 Fed.
273.

In view of these authorities we feel that the Court erred in reducing the verdict from Twenty-five Hundred to Fifteen Hundred Dollars, and that the verdict as it now stands is not excessive.

Counsel next urge that neither the pleadings nor the evidence justify a recovery by defendant in error.

We will first examine the pleadings:

In the case of Doichinoff v. C. M. & St. P. Ry. Co., (Mont. 1916) 154 Pac. 924, the same counsel represented the plaintiff and defendant and the pleading is almost in the identical language as will be seen.

The court says:

“The complaint proceeds upon the theory of the last clear chance doctrine.”

The charging part is as follows:

“That they (the defendants) then after seeing that the said Chris Koleff, was in a place of danger, and that he was not aware of his danger negligently and carelessly failed to stop said engine, and said defendants negligently failed to sufficiently warn the said Chris Koleff, of the approach of said engine, and negligently and carelessly permitted and allowed the said engine to coast along noiselessly and to strike said Chris Koleff, inflicting upon him grievous bodily injury, from which he died within a short time thereafter.”

The Court further says:

“To state a cause of action within the doctrine of the last clear chance, it is necessary to disclose in the complaint:

- (1) The exposed condition brought about by the negligence of plaintiff or the person injured.
- (2) The actual discovery by defendant of the perilous situation of the person or property in the time to avert injury; and
- (3) The failure of defendant thereafter to use ordinary care to avert the injury.”

Dahmer v. Northern Pac. Ry. Co., 48 Mont. 156; 136 Pac. 1059; 142 Pac. 209.

“Preceding that portion of the complaint quoted above, discovery of Koleff’s peril or the duty to discover it is charged in the alternative, and in this respect the pleading is indefinite; but in the absence of a reasonable attack by motion or special demurrer particularly pointing out the defect we think the allegations, taken as a whole, sufficient to state a cause of action and apprise the defendants of plaintiff’s theory of his case.”

Gauss v. Trump, 48 Mont. 92; 135 Pac. 910.

We repeat a casual examination of the two complaints drawn by same counsel are identical and should dispose of the contentions of defendant’s counsel as to the sufficiency of the complaint.

SPECIFICATIONS IV TO IX.

Answering the argument of counsel for defendant upon his specification of error Numbers four and nine inclusive. We submit that no prejudicial error was committed, and we do not feel that counsel seriously contend that there was.

The first question asked in specification of error number four (4) was not leading and consequently the objection was properly overruled.

The second question did call for hearsay evidence but it was upon an immaterial matter, that would not tend to increase or decrease the verdict in this case.

It is improper to ask leading questions as well as to ask one calling for hearsay, but no court ever reversed a judgment because one or two leading questions were asked during the course of a trial, or because hearsay testimony was given upon an immaterial matter.

The question asked of Glover on cross-examination as to what was the first information he had respecting the boy, was clearly improper cross-examination, was irrelevant, immaterial and called for hearsay testimony, and the same is true of counsel's offer of proof in specification of Error Number Six. If the boy was sleeping in a barn and someone saw him it might even then be doubtful, as to whether without something more it would be competent. Possibly counsel for the defendant, unlike

counsel for plaintiff, has never enjoyed such an experience.

The question asked of the witness W. G. Ward, objected to and assigned as Specification Number Seven (7), called for hearsay testimony and was immaterial and the Court properly sustained the same.

We feel that specifications of error numbers Eight (8) and Nine (9) are not even worthy of comment further than what the Court said in sustaining the same.

No error was committed by the court in the reception or rejection of evidence.

EVIDENCE.

Coming now to an analysis of the evidence let us see if it does not come strictly within the rule as laid down by the Supreme Court of Montana, in the case of *Doichinoff v. Chicago, Milwaukee & St. Paul Railway Company*, (*supra*).

Chappell, the foreman of the crew testified: "The person in the wagon did not stop the team at any time; never made any stop. He did not attempt to make any stop. The team never slackened, and never showed any indications that there was any line pulled on them at all. I could see the lines after I * * * I don't know just what the distance was that I could see the lines, but the slack wasn't taken out of them at the point where I could see them. There was never any effort on his part made to stop that I could see. There was no effort, and the team wasn't checked at any time; they continued

in that same gait all the time that I seen them, until the engine struck the wagon,” (Tp. 33).

This evidence together with the evidence of his being struck by the engine shows,

(1) The exposed condition brought about by the negligence of the person injured.

Chappell, further says:

“When I gave the first signal to the engineer to slow up I was approximately 150 feet east of the crossing. When I gave the signal to stop, I was approximately 75 feet between 75 and one hundred feet from the crossing. (Tp. 37).

“When I gave him (referring to the engineer) the stop sign I made up my mind it was necessary to stop, and to help matters along took a kick at the angle cock, which would have the same effect as the brake valve, but I didn’t get it open, and I got off.” (Tp. 38).

The engineer of the train, J. E. Woods, corroborates Chappell as follows:

“The first time I appreciated the boy was in danger or the person with the team, if anybody, was in danger, was when I was 75 feet away from the crossing.” (Tp. 71).

This shows conclusively that the deceased was actually discovered in a place of peril.

Now, Chappell, who at the time he gave his deposition which was introduced in evidence was working for the defendant testified further, that the train would have been stopped in from 25 to 40 feet.

L. S. Groff, who had been railroading for twelve

years testified in answer to a hypothetical question that the train going at six or eight miles an hour should be stopped in fifteen feet. (Tp. 61).

James A. Brittian, an engineer familiar with the engine and the track testified that it should have been stopped in twenty to twenty-five feet.

This taken in connection with Chappell's testimony, that he gave a stop signal to the engineer when the engineer was seventy-five feet from the crossing and Wood's testimony that he considered the boy or who ever was in the wagon in danger when the engine was seventy-five feet away makes out, to our opinion, as complete a case under the doctrine of the last clear chance as we have ever seen presented to a court.

McMasters who was on the rear end of the train as brakeman testified:

“I should judge the emergency brakes were put on that morning about at the crossing; the engine was about at the crossing when they were put on. I could tell that from the distance I went; from the distance it was. After we struck the crossing we past about—I don't just remember, but it must have been four or five car lengths by the crossing.”

Showing that there was a failure to use ordinary care to avert the injury after discovery.

In *Doichinoff v. Chicago, Milwaukee and St. Paul Railway Company* (*supra*), the court further said:

“It is true that there is not in this record any direct evidence that Koleff was actually discovered by the enginemen, in time to avoid

the accident, but the fact may be established by circumstantial evidence. If in this instance it had been made to appear that Koleff was walking upon the railroad track in broad daylight 200 feet or more in advance of Middleton's locomotive; that he apparently unaware of danger, that the view from the locomotive was entirely unobstructed, that the enginemen were at their respective posts of duty on the locomotive, and were keeping a lookout ahead in the direction of Koleff, that the locomotive could have been stopped from ten to thirty feet considering the speed at which it was moving, no one would question the right of a jury to say that Koleff's position was discovered in ample time to avoid striking him, even in face of the positive testimony of the enginemen that they did not see him at all until he was struck. In other words, a particular combination of circumstances may be more convincing than direct evidence whose probative force depends upon the veracity of witnesses more or less interested, while the case presented by the evidence before us is not so complete as in the supposititious case above, we think it sufficient to justify a verdict."

So in this case the fact that the engineer says that when he was 75 feet away he set the brakes and did all he could and yet did not stop until he was 125 feet passed the crossing the circumstances are such that a jury would be justified in not giving much credence to such positive testimony.

We have no quarrel with the case of *Dahmer v. Northern Pacific Railway Company*, 48 Mont. 152;

136 Pac. 1059, but the last word by the Supreme Court of Montana upon the doctrine of the last clear chance and upon the pleadings in such a case is contained in *Doichinoff v. Chicago, Milwaukee & St. Paul Ry. Co.*, (*supra*).

Counsel for defendant call attention to the case of *Southern Ry. Co. v. Carroll*, 138 Fed. 638. It has no application to the facts in the case at bar and is cited, we believe, because it coincides with the ideas of counsel that a railroad has the first right to the use of the public streets.

The Supreme Court of Montana in the case of *Walters v. Chicago, Milwaukee & St. P. Ry. Co.*, 133 Pac. 357, referring to the case of *New York Central & H. R. Co., v. Maidment* 168, Fed. 21; 93 C. C. A. 413; and *Brommer v. Pennsylvania*, 179 Fed. 577; 103 C. C. A. 135, said:

“Both of the decisions just cited emanated from the Circuit Court of Appeals for the Third District, speaking through Judge Buffington, and they proceed upon the mistaken ideas that a railroad has some sort of a paramount right to the use of a public Highway crossing, and that whether a citizen using the highway on approaching such crossing must stop, look and listen depends upon the motive power he is using and its amenability to control; whereas the true rule, as we understand it, is that the citizen has an equal right with the railway company to use the crossing, and the amenability to control of motive power he is using bears more properly upon how near he may come to the place of

danger before taking the precautions that common prudence generally requires. Of these cases nothing further need be said than this: If they are to be taken to hold, in the absence of express statute, that it is contributory negligence, as a matter of law, for the driver of an automobile not to stop, look and listen before using a highway crossing, without regard to whether ordinary prudence would require such a course, they are contrary in spirit to the rule announced by the Superior authority of the Supreme Court of the United States (*Grant Trunk Ry. Co. v. Ives*, 144 U. S. 408) 12 Sup. Ct. 679; 36 L. Ed. 845 * * *”

The argument of Counsel that the doctrine of the last clear chance cannot be invoked where the decedent is guilty of unexcessable negligence is ridiculous in view of the decisions of the Supreme Court of Montana, and of every other Court for the reason that when you invoke the rule of the “last clear chance” you presuppose negligence on the part of the plaintiff or injured person, so here, admitting Clement was guilty of negligence the engineer saw him in a place of danger when he, the engineer, was 75 feet away and experts say he could have stopped in from fifteen to twenty-five feet and McMasters says, he did not put on the emergency brake until the engine was on the crossing.

The case of *Powers v. Iowa Central Ry. Co.*, 136 N. W. 1049, is not in point for the reason that when the defendant discovered plaintiff in danger it was then too late to stop the car.

The Supreme Court of Montana has passed upon cases of this kind and recoveries have been upheld in the following cases:

Neary v. N. P. Ry. Co., 37 Mont. 461; 97 Pac. 944;

Neavy v. N. P. Ry. Co., 41 Mont. 213; 110 Pac. 226;

Melzner v. N. P. Ry. Co., 46 Mont. 162; 127 Pac. 146;

Doichinoff v. C. M. & St. P. Ry. Co., (Supra).

This court in the case of Great Northern Ry. Co. v. Harman, 217 Fed. 959, held that the question as to whether or not the defendant had the last clear chance to avoid the accident was one for the jury.

These cases definitely settle the law in this jurisdiction and it should not be necessary to call attention to numerous other decisions. True it is some courts have held differently and some hesitate to apply the rule in a proper case.

CONCURRENT NEGLIGENCE

We respectfully submit that the rule of concurrent negligence has nothing to do in the consideration of the case at bar. The complaint is based upon and the case was tried upon the theory of the doctrine of the last clear chance. It was alleged that the engineer and the foreman of the engine crew discovered the deceased in a place of danger unobservant of the approach of the train. The evi-

dence introduced on the part of the plaintiff was abundant to show that the engineer and foreman did see the deceased while he was in a place of danger, and when they were 75 feet away from the crossing.

In the case of *Yergy v. Hel. L. & Ry. Co.*, 39 Mont. 213; 102 Pac. 310, which is a case on all fours with the case at bar, the Supreme Court of Montana said:

“We shall assume for the purpose of this decision, that Mr. Yergy, was negligent in placing himself in a situation of peril. It is not a violent inference that he was asleep in his buggy up to a moment just prior to the collision. The testimony of the motorman is, however, to the effect that he saw deceased, and appreciated his peril, when the car was 40 feet south of Lyndale Avenue. He then sounded the gong. Edgerton testified that the car was 50 to 100 feet from the crossing when the gong first sounded; while Bickel testified that he heard the sound when the car was 90 feet south of the crossing, and Mrs. Wise said she heard it when the car was 200 or 300 feet from the point of collision. Peterson testified that the speed of the car was 8 miles per hour, and plaintiff’s testimony tended to show that going at that rate of speed the car could have been stopped in the space of 20 feet. This testimony, which it was the right of the jury to believe, furnished ample basis for the application of the doctrine of last clear chance before the moment of collision.”

It seems to us that further argument of the doc-

trine of the last clear chance in this brief would be a work of supererogation. Your Honors have most carefully considered it before and have followed the rule and most properly applied it many times. The cases heretofore cited lucidly explain the rule, if indeed any explanation, in this enlightened age, is needed. The whole trouble with counsel for plaintiffs in error seems to be that they cannot differentiate between cases in which the doctrine was never invoked or when invoked not sustained by proof, and the cases in which this Circuit and the Supreme Court of Montana have carefully expressed the rule, and correctly applied it. In this connection we beg leave to call the attention of the Court to the fact that counsel for plaintiffs in error merely cite a mass of cases from other jurisdictions that are not applicable.

In closing this subdivision of our brief we trust we may be pardoned for citing one more case, but it is such a complete answer to the argument of counsel for plaintiffs in error that we call it to your Honors' attention. It is:

Teakle v. San Pedro L. A. & L. R. Co., 32
Utah 276; 90 Pac. 402; 10 L. R. A. (n. s.)
486.

In this case the facts were very similar to the case at bar; deceased was struck, fell under a car the engine was pushing and was crumpled up and crushed by the ash pan of the engine after the car passed over him. In commenting upon the claim

put forth by the railroad company the same as is done in this case, the deceased's contributory negligence precluded a recovery, the Supreme Court of Utah held that the doctrine of of last clear chance applied, saying:

“When the deceased was struck by the train and rendered helpless, the effect of his antecedent or contributory negligence was spent.”

We have examined the cases cited by counsel for plaintiff in error. The point upon which most, if not all, of the cases cited by plaintiff in error, turn is that the negligence of plaintiff continued up to the very moment the injury was inflicted. In the case at bar, it can hardly be said for an instant that David Clement, Jr., was acting negligently during any portion of the time that he was being pushed along the track and was rolled and dragged along the ground and track, either in the wagon or when he fell out and was rolled and dragged by the wheels of the engine and later run over by the wheels of the engine that passed over his body, eventually killing him. It is negligence, in the authorities cited by the Supreme Court of Montana, and this court, ceased at the time he got upon the track and the concurrence ceased there. The engineer Woods, stated, that when he saw that there was a possibility the driver would not stop he threw the engine into emergency at a point distance 75 feet from the crossing. It is most respectfully submitted that the failure of the engineer to stop the train after he saw

Clement in a place of peril and the rushing down upon him with the train, colliding with the wagon, and shoving it 250 feet beyond the point of contact with the wagon, traveling 325 feet in all after discovery, where all acts of negligence which occurred after David Clement, Jr., was discovered in a place of peril, and the judgment should be affirmed.

The jury undoubtedly believe, as they had a right to believe, that the testimony by the witnesses for defendant in error was true, and that the train could have been stopped within fifteen or forty feet. As has been well said by an eminent trial judge before whom we have practiced, a jury does not have to believe a thing merely because someone has testified to it, and a jury should judge things not by some unknown or mysterious rule, but as men of common sense. So it is no wonder the jury preferred to believe the witnesses for defendant in error rather than those who testified that a train going at six miles an hour could not be stopped in less than 150 feet. A reading of many cases cited in the brief of this case will show that in hardly any instance was there such a thing as a claim that it took such a remarkable long distance in which to stop a train going at six miles an hour. In the case of *Neary v. N. P. Ry. Co.*, 97 Pac. 946; 37 Mont. 461, in the course of the opinion the Supreme Court of Montana said:

“This train consisted of nine cars and was about 600 feet in length. By the application of the air brake, such a train could be stopped

within 250 or 300 feet when going at the rate of 25 or 30 miles per hour. If going at the rate of 6 miles per hour, it could be stopped within a distance of 6 feet.”

This train consisted of nine cars, and was about 600 feet in length, by the application of the air brake such a train could be stopped when going at the rate of 30 miles an hour within 300 or 350 feet and when going at the rate of six miles per hour, it could be stopped within a distance of six feet.

We respectfully submit that this appeal should be affirmed.

B. K. WHEELER,

JAMES H. BALDWIN,

Attorneys for Defendant in Error.

SERVICE of the above and foregoing Brief admitted and copy thereof received this.....day of May, A. D. 1917.

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Attorneys for Plaintiffs in error.





